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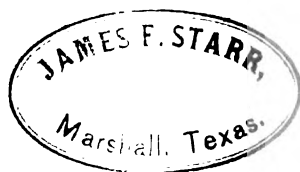
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*Texas Annotated Statutes, Revised Statutes.*

*Revised and annotated* CF



THE

**ANNOTATED STATUTES,**

CIVIL AND CRIMINAL,

OF

**THE STATE OF TEXAS,**

CONTAINING LAWS OF

THE 20<sup>TH</sup> LEGISLATURE, SPECIAL SESSION,  
AND THE 21<sup>ST</sup> LEGISLATURE, WITH  
NOTES OF DECISIONS.

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**SUPPLEMENT FOR 1889.**

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BY

**JOHN SAYLES AND HENRY SAYLES,**  
**ABILENE, TEXAS.**

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**NOTE.**

The Twentieth Legislature convened in Special Session April 16th, 1888, and adjourned May 15th, 1888. The Twenty-first Legislature convened in Regular Session January 8th, 1889, and adjourned April 6th, 1889.

When an Act took effect at its passage, the date of its passage, and the page of the Session Laws where it is to be found, are given. When an act took effect at a time specially designated in the act, or after the adjournment of the session, the date of its passage, and the time when it took effect, are given.



## HOW TO USE THIS BOOK.

This book contains the general laws, civil and criminal, of the 20th Legislature, Special Session, which convened April 16th, 1888, and adjourned May 15th, 1888; and of the 21st Legislature, which convened January 8th, 1889, and adjourned April 6th, 1889; annotated by references to the decisions of the Commission of Appeals in consent cases, published in Posey's Unreported Cases, the decisions of the Supreme Court, reported in 67, 68, 69, 70 and part of 71, Texas Reports, and the decisions of the Court of Appeals, in the 25th and 26th and part of 27th Court of Appeals Reports.

*It is a Supplement to the Annotated Civil and Criminal Statutes, to be used in connection with, and as a continuation of, that work. Each item appears under exactly the same article or note number as it would if incorporated into a new edition of the Statutes.*

The laws and decisions are arranged on the plan adopted in the Revised Statutes of Texas and followed in the Annotated Statutes. The laws are arranged according to their subjects, under appropriate titles, and the several articles are numbered consecutively. The dates when an act was passed and took effect, and the page of the Session Acts where it is found, are stated.

The notes of the decisions relating to the statutes are arranged under the article construed. Where the decisions relate to the general subject of a law, and not to any special provision of the statute, the notes are arranged under some appropriate article, or at the end of the title. The notes in this Supplement are numbered to correspond with the numbers of the notes in the Annotated Statutes which refer to the same subject matter. When new matter is introduced the notes are numbered consecutively.

*To illustrate:—*By acts of the 20th Legislature, S. S., p. 10, and of the 21st Legislature, p. 53, additional duties were imposed on the Commissioner of Agriculture. These acts will be found under Title 2, *Agriculture*, sections of the acts so added being numbered consecutively for reference.

By the act of May 14th, 1888, S. S., p. 4, a new article was added to the statute relating to taxation, which will be found under Title 95, *Taxation*, as Art. 4748a. The act of March 7th, 1889, 21st Leg. p. 138, will be found under the same title, numbered Art. 4759b. By the act of April 30th, 1888, S. S., p. 1, Art. 566, Ch. 2, Title 20, was amended. This amendment will be found in this Supplement under Title 20, Art. 566.

In *Seale v. Baker*, 70 T. 283, is an important decision relating to the liabilities of directors of corporations, and a synopsis of the same will be found as note (1), under Art. 594, relating to that subject. In *Railway v. Ellis*, 70 T. 307, the duty of a railway company is defined in regard to the construction of crossings required by Art. 4170b, Civil Statutes; a synopsis of this decision will be found under that article.

All of the decisions relating to the duties and liabilities of carriers are arranged under that title. A decision based on any article of the statute will be found under that article. If the decision rests upon the common law, it will be found under some appropriate article, or at the end of the title. Thus, the decision in *Kohn v. Washer*, 69 T. 67, relating to the signature of an affiant to an affidavit, is note (1) under Art. 6. The decision in *McCart v. Maddox*, 68 T. 456, relating to assignments for the benefit of creditors, is note (1) under Art. 65a. By looking at Art. 65a, in the Annotated Statutes, will be found note (1) referring to decisions on the same subject matter. The object of this arrangement is to give the reader a reference to all the cases when examining a particular subject in either book.

All of the decisions of the Supreme Court relating to assignments for the benefit of creditors, attachment and garnishment, carriers, conveyances, etc., whether based on the statute or general law, reported since the publication of the Annotated Civil Statutes, will be found under the appropriate titles.

None of the decisions of the Court of Appeals in civil cases are contained in this work, from the fact that all of the cases reported and published at time of going to press, including Willson's Condensed Appeal Cases, Vol. 3, part 2, are found in the Annotated Statutes.

The Criminal Statutes, passed at the special session of the 20th Legislature, and by the 21st Legislature, with the decisions of the Court of Appeals in criminal cases, reported since the publication of the Annotated Criminal Statutes, are arranged in the second

part of this Supplement, upon the plan adopted in Willson's Annotated Criminal Statutes, and is a continuation of that work.

The following plan, for the use of this work, is commended to those who desire to save time and labor and avoid mistakes. Check the numbers of the articles and notes in the Annotated Statutes where a corresponding number is found in this Supplement. That will indicate that the article so marked has been amended or repealed, and that additional decisions relating to the subject matter of the note marked are also to be found in the Supplement.

When new titles or additional articles are found in the Supplement at the proper place in the Annotated Statutes, mark the new title or the numbers of the articles.

The authors believe that this Supplement will not only be of value to the profession, but will add to the value of the Annotated Statutes. The Revised Statutes was the beginning of a new system of legislation. In consequence of the great changes in legislation made by the Constitution of 1876, the revision of the existing laws was then an absolute necessity. That Constitution, and the revision prepared under its requirements, have, within the last ten years, been construed by the Appellate Courts, and doubts and difficulties resulting from changes in the subject matter and verbiage of laws have, to a great extent, been removed by judicial interpretation.

The admirable plan adopted in the revision of the statutes permits the incorporation of amendments, by way of repeals, supplemental provisions, and additions of new subjects, without destroying the symmetry of the plan.

The new law should always be read in connection with the old law and the decisions relating thereto, which make apparent the reason and effect of the changes.

Rights accruing under repealed laws must be determined by their provisions, and a knowledge of them is always essential to the practicing lawyer. The Revised Statutes, adopted in 1879, and all laws of a general character since enacted, are now to be found in the Annotated Statutes and this Supplement.

To keep up with current legislation and decisions, it will only be necessary to buy new books containing new matter. The old books will still retain their value. Laws being classified according to their subjects, and arranged under titles and numbers, references are



readily made to all acts and decisions relating to the same subject matter, although found in different volumes.

We desire to express to our professional brethren a just appreciation of the great kindness with which our former work has been received. The errors of omission and commission, incident to so large a work, have not been the occasion of censorious criticism; and while the price of the work seems high, the necessity for it has been recognized and excused, from the fact that no part of the burden of arranging and publishing the laws and decisions in a convenient form, for the use of the people whom they so largely concern, has been borne by the State, but has rested alone upon the legal profession, limited in numbers, and, therefore, more heavily taxed for the public benefit.

JOHN SAYLES,  
HENRY SAYLES.

ABILENE, TEXAS, August, 1889.

THE  
ANNOTATED STATUTES  
OF  
THE STATE OF TEXAS.

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SUPPLEMENT FOR 1889.

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TITLE 1.—ADOPTION.

ARTS. 1, 2. See Civil Statutes.

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TITLE 2.—AFFIDAVITS, OATHS AND AFFIRMATIONS.

ART.

3, 4, 5. See Civil Statutes.

6. All affidavits must be in writing and signed. *Annotated.*

ART.

7, 8. See Civil Statutes.

ART. 6. Affidavits must be in writing and signed.

(2) The jurat to an affidavit was as follows: "Subscribed by the said David A. Kohn, and by him sworn to before me this, the 31st day of August, A. D. 1885." This was signed officially by the notary, and the signature of David A. Kohn appeared immediately below the official designation of the notary. It being apparent that the signature of the affiant was so placed for the purpose of subscribing to the instrument, it was held sufficient. *Kohn v. Washer & August*, 69 T. 67.

(2—Sup. Tex. Stat.)

## TITLE 2a.—AGRICULTURE, INSURANCE, STATISTICS, AND HISTORY.

### ART. 8a.

- §1. See Civil Statutes.
- §2. Title of commissioner; Seal; Clerks, etc. *Amendment.*
- §§3, 4. See Civil Statutes.
- §5. Agricultural statistics collected. *Amendment.*
- §6. Assessor of taxes, duties and compensation of. *Amendment.*
- §7. See Civil Statutes.
- §8. A geological and mineralogical survey shall be made. *New.*

### ART. 8a.

- §9. Assays, etc., of minerals, etc. *New.*
- §10. Records shall be preserved; Reports, etc. *New.*
- §11. Fees charged for assays, etc. *New.*
- §12. Commissioner and employes shall not be interested in mines. *New.*
- §13. Appropriation. *New.*

### §2. Title of commissioner; seal; clerks, etc.

The present commissioner of insurance, statistics, and history shall assume the title named in the foregoing section as his official designation. He shall change the seal of his department so as to conform thereto, by inserting in it the words, Department of Agriculture, Insurance, Statistics, and History, of the State of Texas, or an intelligible abbreviation thereof, and shall at once assume, in addition to his present duties, those imposed by this act relating to agriculture, and shall appoint such clerks as the additional labor of his department requires. [Amendment March 2, 1889, 21 Leg. p. 53.]

### §5. Agricultural statistics, etc., collected.

It shall be the duty of the commissioner to arrange and adopt a plan for collecting and publishing agricultural and farm statistics, in such manner and numbers as he may deem best, or the condition of the department will permit, and shall, before the first day of January of each year, furnish the tax assessors of the several counties in the state with the necessary blanks, together with such instructions as will properly direct them in that work, and such blanks shall contain only such questions as relate to agriculture, horticulture, and stockraising. [Amendment March 2, 1889, 21 Leg. p. 53.]

### §6. Assessor of taxes, duties and compensation of.

It shall be the duty of tax assessors when listing property for taxes to also call on tax payers and heads of families in their respective counties engaged in agriculture, horticulture, or stockraising, for necessary facts and information for filling out the blanks; they shall be allowed by the commissioners' court not less than five cents nor more than ten cents for each tax payer engaged in the

**T. 2a.] AGRICULTURE, INSURANCE, STATISTICS & HISTORY. Art. 8a.**

occupation heretofore mentioned from whom information for filling out the blanks is secured, one-half to be paid by the state and one-half by the county, to be paid in the same manner that the fees for assessing state and county taxes are now paid; and when any assessor fails or refuses to comply with the provisions of this act, or the instructions of the commissioner, the comptroller shall, on notice from the commissioner, withhold the pay due such assessor for assessing the state taxes of his county, until notified by the commissioner that such assessor has complied with the law. And assessors are hereby required to report to the commissioner not later than October first of each year. [Amendment March 2, 1889, 21 Leg. p. 53.]

**§8. A geological and mineralogical survey to be made.**

It shall be the duty of the commissioner of agriculture, insurance, statistics, and history to have a geological and mineralogical survey made of the State of Texas, and for that purpose he shall employ such a number of competent persons skilled in the science of geology and mineralogy as shall be necessary to properly and expeditiously execute said work. The persons so employed shall be under the supervision and control of the said commissioner, and shall receive such compensation as the commissioner may direct, not to exceed two thousand dollars per year. The commissioner shall provide all necessary chemical apparatus, books, maps, and stationery to carry out the provisions of this act, and may employ such additional clerks as shall be requisite to a proper execution of this act, which clerks shall receive such compensation as he may deem proper, not to exceed nine hundred dollars each per year. [Act May 12; Aug. 14, 1888, §1; 20 Leg. S. S. p. 10.]

**§9. Assays, etc., of minerals, etc., shall be made.**

The commissioner shall cause to be made assays, analyses, or other scientific examination of all beds or deposits of ores, coals, clays, marls, and other mineral substances situated in this state, as shall be requisite to a correct knowledge of the extent and value thereof. He shall also in all proper cases upon application require like examinations, assays, or analyses to be made of deposits, mines, and lands situated in this state, and shall furnish proper certificates of the result of such examination, assay, or analysis. He shall also upon request of any person require assays or analyses to be made of any specimen of soil or mineral deposit in this state, and shall also furnish to the party requesting it a certificate thereof; *provided*, that in all cases when assays or analyses are made upon request of any person the party making the request shall be required by the commissioner to make affidavit that the specimen offered was found upon the land of the party making the request, or that said request is made at the instance or with the full knowledge and

**T. 2a.] AGRICULTURE, INSURANCE, STATISTICS & HISTORY. Art. 8a.**

consent of the owner of the land upon which said specimen was found. [Act May 12; Aug. 14, 1888, §2; 20 Leg. S. S. p. 10.]

**§10. Records shall be preserved; reports, etc.**

The commissioner shall preserve a record of this department of his office, and the information therein collected and preserved shall be reported to the governor as in case of other matters relating to his office. He shall also report to the governor before each session of succeeding legislatures, for information of the governor and such legislatures, all money expended under this act, and how and for what purpose such money was expended. He shall also report the amounts of money received from persons, corporations, or syndicates for services rendered, specifying the amount so received. He shall also preserve specimens of minerals, coals, stones, and other natural substances useful in agricultural, manufacturing, or the mechanical arts, and shall from time to time as far as practicable add specimens of organic remains and other objects of natural history peculiar to this state. [Act May 12; Aug. 14, 1888, §3; 20 Leg. S. S. p. 10.]

**§11. Fees charged for assays, etc.**

The commissioner shall prescribe a schedule of reasonable fees to be charged and collected from all persons having scientific examinations, assays, or chemical analyses made, and for certificates furnished under this act, which fees shall when collected be paid into the state treasury to the credit of the general revenue fund. [Act May 12; Aug. 14, 1888, §4; 20 Leg. S. S. p. 10.]

**§12. Commissioner and employes shall not be interested in mines.**

It shall be unlawful for the commissioner of agriculture, insurance, statistics, and history, or any person employed by him or connected with his office, to purchase all or any part of any mine or mineral lands, or be in any manner interested in such purchase, during the term of his office or employment. Any person violating the provisions of this section shall be punished by fine not less than one thousand dollars, and shall be removed from his office, or employment, as the case may be. [Act May 12; Aug. 14, 1888, §5; 20 Leg. S. S. p. 10.]

**§13. Appropriation.**

That the sum of fifteen thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated, out of any moneys in the state treasury not otherwise appropriated, for the purpose of carrying out the provisions of this act; *provided*, that no expense in excess of the amount hereby appropriated shall be incurred under the provisions of this act. [Act May 12; Aug. 14, 1888, §6; 20 Leg. S. S. p. 10.]



## TITLE 3.—ALIENS.

**ARTS. 9, 10.** See Civil Statutes.

## TITLE 4.—APPORTIONMENT.

**ART.**

11. Senatorial districts. See Civil Statutes, and, *post*, Arts. 745a, §5; 817a, §6.  
 12. See Civil Statutes.  
 13. Representative districts. See Civil Statutes, and, *post*, Arts. 745a, §5; 817a, §6. *New*.  
 14, 15. See Civil Statutes.

**ART.**

16. Congressional districts. See Civil Statutes, and, *post*, Arts. 745a, §5; 817a, §6. *New*.  
 17. Judicial Districts. See Civil Statutes, and, *post*, §§7, 8, 11, 12, 13, 14 and 44; 16, 20, 24, 26, 27, 28, 29, 31, 32, 34, 37 and 45; 38, 39, 40, 41, 46, 47, for judicial districts, with said numbers. *Amendments and new*.

### Art. 17.—JUDICIAL DISTRICTS.

#### §7.—SEVENTH DISTRICT.

(1.) The district court in the several counties comprising the *seventh judicial district* shall be held as follows:

In the county of Smith on the first Monday of February and September of each year, and may continue in session seven weeks.

In the county of Van Zandt on the seventh Monday after the first Monday in February and September of each year, and may continue in session four weeks.

In the county of Wood on the eleventh Monday after the first Monday in February and September of each year, and may continue in session three weeks.

In the county of Upshur on the first Monday in January and on the seventeenth Monday after the first Monday in February, and may continue in session three weeks.

In the county of Gregg [on] the fourteenth Monday after the first Monday in September and February, and may continue in session three weeks.

(2.) All writs and process heretofore returnable to the district courts of the several counties comprising the seventh judicial district shall be returnable as herein provided, and shall be as valid and binding as though no change had been made in the times for holding courts herein.

(3.) All laws and parts of laws in conflict with this act be, and the same are hereby, repealed.

(4.) This act take effect and be in force on and after Monday, August 5, 1889. [Act April 2; Aug. 5, 1889; 21 Leg. p. 147.]

§8.—EIGHTH DISTRICT.

(1.) The district courts for the *eighth judicial district* of Texas shall be held on and after June 1, 1889, as follows:

In the county of Hunt on the first Monday in January and on the second Monday in June, and may continue in session seven weeks.

In the county of Rains on the seventh Monday after the first Monday in January and on the third Monday after the second Monday in September, and may continue in session three weeks.

In the county of Delta on the tenth Monday after the first Monday in January and on the second Monday in September, and may continue in session three weeks.

In the county of Hopkins on the thirteenth Monday after the first Monday in January, and on the sixth Monday after the second Monday in September, and may continue in session six weeks.

(2.) The provisions of this act shall take effect and be in force on and after June 1, 1889, and all process issued before that time and all bonds and other obligations entered into prior to that time shall be returnable to the courts as now held; but all such process and obligations issued June the first, 1889, and thereafter, shall be returnable to the terms of court as herein provided for.

(3.) All process issued prior to June the first, 1889, and all bonds and obligations entered into prior to that time, shall be of legal force and effect as the terms of court provided for herein after the first day of June, 1889, and shall require the person served with such process and parties to such obligations to appear at the times of holding court specified herein and do and perform any act required of such party as if the court were held at the time specified in such bond or process.

(4.) *Resolved*, that an imperative public necessity exists for the immediate passage of this act, and it shall take effect from and after its passage. [Act April 2, 1889; 21 Leg. p. 148.]

Compare §§ (2) and (4).

§11.—ELEVENTH DISTRICT.

(1.) The terms of the court of the *eleventh judicial district* shall hereafter be held as follows:

In the county of Montgomery on the first Monday of July and December in each year, and may continue in session four weeks.

In the county of Harris on the first Mondays in January, April, and October of each year, and shall continue in session eight weeks, or until the business of the court is disposed of.

(2.) All process and writs heretofore issued, or which may be issued up to the time this act takes effect, by or from the district court of said counties, and made returnable to the terms of said court as now fixed by law, shall be returnable to the next ensuing term of said courts as prescribed by this act, and all such writs and process are hereby legalized and validated as if the same had been made returnable to the term of said courts as fixed by this act. [Act March 19; July 6, 1889; 21 Leg. p. 149.]

§12.—TWELFTH DISTRICT.

(1.) The *twelfth judicial district* shall be composed of the counties of Trinity, Walker, Madison, Leon, and Grimes, and the district courts shall be held in said counties as follows:

In the county of Trinity on the first Mondays in March and September, and may continue in session three weeks.

In the county of Walker on the third Monday after the first Monday in March and September, and may continue in session three weeks.

In the county of Madison on the sixth Monday after the first Monday in March and September, and may continue in session three weeks.

In the county of Leon on the ninth Monday after the first Monday in March and September, and may continue in session three weeks.

In the county of Grimes on the twelfth Monday after the first Monday in March and September, and may continue in session until the business is disposed of.

(2.) All writs and process, civil and criminal, heretofore issued and which may be hereafter issued up to the time this act takes effect, and which are made returnable to the terms of the court in said twelfth judicial district as now fixed by law, be, and are hereby, made returnable to the terms of said court as fixed by this act, in the same manner as if this act were in force when the same were or may be issued. [Amendment January 22, 1889; 21 Leg. p. 149.]

§13.—THIRTEENTH DISTRICT.

(1.) The *thirteenth judicial district* shall be composed of the counties of Limestone, Freestone, and Navarro, and the district courts shall be held therein as follows:

In the county of Freestone on the first Monday in September and the second Monday in February, and may continue in session four weeks.

In the county of Limestone on the fourth Monday after the first Monday in September and on the fourth Monday after the first Monday in February, and may continue in session five weeks.

In the county of Navarro on the first Monday in May and the first Monday in December of each year, and may continue in session eight weeks. [Amendment March 19, 1889; 21 Leg. p. 150.]

(1.) The *thirteenth judicial district* of the state shall be composed of the counties of Limestone, Freestone, and Navarro, and the district courts shall be begun and held therein as follows:

In the county of Limestone on the first Monday in January and the fifth Monday after the first Monday in July, and may continue in session five weeks.

In the county of Freestone on the fifth Monday after the first Monday in January and on the third Monday in September, and may continue in session four weeks.

In the county of Navarro on the first Monday in April, first Monday in July, and the fourth Monday after the third Monday in September, and may continue in session five weeks.

(2.) *Provided*, that the provisions of this act shall not affect the term of the district court now in session in Limestone county. [Amendment April 1, 1889; 21 Leg. p. 151.]

§§14 AND 44.—FOURTEENTH AND FORTY-FOURTH DISTRICTS.

(1.) All that part of Dallas county lying north of the following line, viz: Beginning at the point on the east boundary line of said county where the same is intersected by the center of the track of the Texas and Pacific Railroad; thence in a western direction with the center of the track of said railroad to a point in the city of Dallas where the same is crossed by Jefferson street; thence in a southern direction along the center of said street to a point directly opposite to the center of the court-house situated in said city; thence in a western direction directly through the center of said court-house to the Trinity river; thence up said river to the point where the same is crossed by said railroad; thence in a western direction with the center of the track of said railroad to the point where the same crosses the western boundary line of said county, shall constitute the fourteenth judicial district, and the district court shall be begun and held therein as follows: On the second Mondays in March, May, September, and December, and may continue in session until the business is disposed of.

(2.) All that part of said county of Dallas lying south of the line as defined in the foregoing section of this act shall constitute the forty-fourth judicial district, and the district courts shall be begun and held therein as follows: On the first Mondays in January, April, June, and October, and may continue in session until the business is disposed of.

(3.) Said district courts of the fourteenth and forty-fourth judicial districts shall have concurrent jurisdiction throughout the limits of said Dallas county of all matters civil and criminal of which jurisdiction is given to the district court by the constitution and laws of the state; and the grand and petit juries for said courts respectively shall be selected and drawn from the body of the county; *provided*, that the judge of the fourteenth judicial district shall cause a grand jury to be drawn for and organized at the March and September terms of said court, and the judge of the forty-fourth judicial district shall cause a grand jury to be drawn for and organized at the January and June terms of said court; *provided further*, that either of said judges may in his discretion have a grand jury drawn for and organized at any other time or terms of this court.

(4.) The judge of the fourteenth judicial district as heretofore constituted shall continue as the judge of the fourteenth judicial district as herein constituted until the expiration of the term of his office and until his successor shall be elected and qualified.

(5.) Immediately after this act takes effect the governor shall appoint a suitable person as judge of the forty-fourth judicial district, who shall hold said office until the next general election held for state and county officers and until his successor shall be elected and qualified.

(6.) If any election precinct in Dallas county, or ward in any incorporated city or town therein, shall be situated in part in each of the districts hereby created, then each voter thereof shall vote for the district judge only of the district in which such voter resides.

(7.) When this act takes effect the clerk of the district court of Dallas county shall make up a docket for each of said courts by placing thereon alternately the cases, civil and criminal, now pending in the district court of Dallas county; that is, said clerk shall place the first case on said docket upon the docket of the fourteenth judicial district, and the next upon the docket of the forty-fourth judicial district, and so on to the end of said docket, so that the pending business may be as equally divided between said courts as can in this mode be accomplished; and all cases, prosecutions, and proceedings thereafter filed with said clerk shall by him be entered upon the dockets of said courts alternately, so that the business may be equally distributed between said courts; *provided*, either of said judges may in his discretion transfer any case or cases pending in his court to the other district court herein provided for by order or orders entered upon the minutes of his court, and where such transfer or transfers are made the clerk of the district court of Dallas county shall enter such case or cases upon the docket of the court to which the transfer is made.



(8.) All process heretofore issued or served, returnable to the district court of Dallas county, shall be considered as returnable at the times as herein prescribed, and all such process is hereby legalized and validated as if the same had been made returnable to the court and at the time herein prescribed.

(9.) That all laws and parts of laws in conflict with this act are hereby repealed.

(10.) The crowded condition of the docket of the district court of Dallas county creates an imperative public necessity and emergency that requires that the constitutional rule requiring bills to be read on three several days be suspended, and that this bill be placed upon its passage without being so read, and that this act take effect and be in force from its passage, and it is so enacted. [Amendment 21 Leg. p. 152.]

[NOTE.—The foregoing act originated in the senate, and passed the same by a vote of 23 yeas, 4 nays; and passed the house by a vote of 60 yeas, 34 nays. It was presented to the governor of Texas for his approval on the twenty-seventh day of February, 1889, and was not signed by him nor returned to the house in which it originated with his objections thereto within the time prescribed by the constitution, and thereupon became a law without his signature.—J. M. MOORE, Secretary of State.]

#### §16.—SIXTEENTH DISTRICT.

(1.) The *sixteenth judicial district* shall be composed of the counties of Denton, Montague, and Cooke, and the district court shall be held therein as follows:

In the county of Montague on the second Mondays in January and July, and may continue in session six weeks.

In the county of Denton on the sixth Mondays after the second Mondays in January and July, and may continue in session eight weeks.

In the county of Cooke on the sixteenth Mondays after the first Mondays in January and second Mondays in July, and may continue in session until the business is disposed of.

(2.) All laws and parts of laws in conflict with this act be, and the same are, repealed. [Amendment March 13, 1889; 21 Leg. p. 154.]

#### §24.—TWENTY-FOURTH DISTRICT.

(1.) The *twenty-fourth judicial district* shall be composed of the counties of De Witt, Karnes, Victoria, Bee, Goliad, Refugio, Calhoun, and Aransas, and the district courts shall be held therein as follows:

In the county of Aransas on the second Mondays in February and August, and may continue in session two weeks.

In the county of Refugio on the fourth Mondays in February and August, and may continue in session two weeks.

In the county of Bee on the second Mondays in March and September, and may continue in session two weeks.

In the county of Karnes on the fourth Mondays in March and September, and may continue in session two weeks.

In the county of Goliad on the second Mondays in April and October, and may continue in session two weeks.

In the county of Calhoun on the fourth Mondays in April and October, and may continue in session two weeks.

In the county of Victoria on the second Mondays in May and November, and may continue in session two weeks.

In the county of De Witt on the first Mondays in June and December, and may continue in session four weeks, or until the business is disposed of.

(2.) All writs and process returnable to any of the courts of the twenty-fourth judicial district as now provided by law shall after this act takes effect be returnable to the terms of said court as herein fixed, and shall be as valid and binding as if made returnable thereto. [Amendment April 2, 1889; 21 Leg. p. 155.]

#### §25.—TWENTY-FIFTH DISTRICT.

(1.) The district courts of the several counties comprising the *twenty-fifth judicial district* of Texas shall hereafter begin and hold their terms as follows:

In the county of Colorado on the first Mondays in March and September of each year, and may continue in session six weeks at each term.

In the county of Lavaca on the first Mondays in February and August of each year, and may continue in session four weeks at each term.

In the county of Gonzales on the first Mondays in January and July of each year, and may continue in session four weeks at each term.

In the county of Guadalupe on the first Mondays in May and November of each year, and may continue in session four weeks at each term.

In the county of Wilson on the first Mondays in June and December of each year, and may continue in session four weeks at each term.

(2.) All laws and parts of laws in conflict with the provisions of this act are hereby repealed. [Amendment January 22, 1889; 21 Leg. p. 156.]

#### §26.—TWENTY-SIXTH DISTRICT.

(1.) The *twenty-sixth judicial district* shall be composed of the counties of Travis and Williamson, and the terms of the district

court of the twenty-sixth judicial district shall hereafter be held as follows:

In the county of Williamson on the first Monday in January in each year, and continue in session until the last Saturday before the third Monday in February; and on the first Monday in July, and continue in session until the last Saturday in July, unless the business of the court should be sooner disposed of.

In the county of Travis on the third Monday in February in each year, and continue in session until the last Saturday before the first Monday in May; on the first Monday in May, and continue in session until the last Saturday before the first Monday in July; on the first Monday in September, and continue in session until the last Saturday before the first Monday in November; on the first Monday in November, and continue in session until the last Saturday before the twenty-fifth day of December, unless the court should deem it proper to adjourn this term at an earlier day; *provided*, that a grand jury for Travis county may not be drawn except for the May term and November term of said court, unless the district judge should deem it necessary to call a grand jury at other terms and should so order. [Amend. Mch. 5, Aug. 5, 1889; 21 Leg. 156.]

§27.—TWENTY-SEVENTH DISTRICT.

(1.) The terms of the district court in the *twenty-seventh judicial district* of the State of Texas shall hereafter be begun and holden as follows, to wit:

In the county of Mills on the third Mondays in March and September of each year, and may continue in session two weeks.

In the county of Burnet on the first Mondays in April and October of each year, and may continue in session four weeks.

In the county of Lampasas on the first Mondays in May and November of each year, and may continue in session four weeks.

In the county of Bell on the first Mondays in July and January of each year, and may continue in session until the business is disposed of.

(2.) All process heretofore issued or served in any of said counties and returnable to the respective terms of the district court therein as fixed by existing laws, and all process that may hereafter and prior to the taking effect of this act be issued or served in any of said counties and returnable to the respective terms of the district court therein as fixed by existing laws, be, and the same are hereby, legalized and validated and shall be considered as returnable to the next term of said court as herein prescribed, and grand and petit juries heretofore or hereafter and prior to the taking effect of this act selected, drawn, or summoned to serve during the respective terms of the district court in said counties as fixed by existing laws,

be, and the same are hereby, legalized and validated, and shall be considered selected, drawn, or summoned, as the case may be, to serve during the next term of said court as herein prescribed.

(3.) All of section twenty-six (26) of "An act to redistrict the state into judicial districts and fix the times of holding court therein, and to provide for the election of judges and district attorneys in said districts at the next general election to be held on the first Tuesday after the first Monday in November, 1884," approved April 9, 1883, and that so much of section six (6) of "An act to establish and organize the county of Mills," approved March 15, 1887, as conflicts with the provisions of this act, and all other laws in conflict herewith, be, and the same are hereby, repealed. [Act February 21, 1889; 21 Leg. p. 157.]

§28.—TWENTY-EIGHTH DISTRICT.

(1.) The *twenty-eighth judicial district* of the State of Texas shall be composed of the counties of Webb, Encinal, Duval, Nueces, Zapata, Starr, Hidalgo, and Cameron, and the district courts therein be held as follows:

In the county of Cameron on the first Monday in May and November, and may continue in session four weeks.

In the county of Hidalgo on the fourth Monday after the first Monday in May and November, and may continue in session two weeks.

In the county of Starr on the sixth Monday after the first Monday in May and November, and may continue in session two weeks.

In the county of Zapata on the eighth Monday after the first Monday in May and November, and may continue in session one week.

In the county of Webb on the ninth Monday after the first Monday in May and November, and may continue in session five weeks.

In the county of Duval on the fourteenth Monday after the first Monday in May and November, and may continue in session two weeks.

In the county of Nueces on the sixteenth Monday after the first Monday in May and November, and may continue in session until the business is disposed of, not to exceed six weeks.

The unorganized county of Encinal is hereby attached to the county of Webb for judicial purposes.

(2.) All writs and process civil and criminal heretofore issued by or from the district courts in the several counties in the said district and made returnable to the former terms of said courts as said terms are now fixed by law, shall be returnable to the next ensuing terms of said district courts in each county as they are prescribed in this act; and all such writs and process that may be issued by or from said courts at any time within five days next before the hold-

ing of the next ensuing terms of said courts as prescribed herein, are hereby made returnable to the term or terms of said courts as the terms thereof are herein prescribed.

(3.) All laws and parts of laws in conflict herewith be, and the same are hereby, repealed. [Amendment March 25, 1889; 21 Leg. p. 158.]

§29.—TWENTY-NINTH DISTRICT.

(1.) The *twenty-ninth judicial district* shall be composed of the counties of Palo Pinto, Hood, Somervell, Erath, Hamilton, and Coryell, and the terms of the district court shall be held therein each year as follows:

In the county of Palo Pinto on the first Mondays in February and August, and may continue in session three weeks.

In the county of Hood on the third Mondays in March and September, and may continue in session three weeks.

In the county of Somervell on the fifth Mondays after the first Mondays in March and September, and may continue in session two weeks.

In the county of Erath on the seventh Mondays after the first Mondays in March and September, and may continue in session four weeks.

In the county of Hamilton on the eleventh Mondays after the first Mondays in March and September, and may continue in session three weeks.

In the county of Coryell on the third Mondays in January and July, and may continue in session four weeks.

(2.) All writs, process, and bonds, civil and criminal, which may be issued or executed up to the time this act takes effect, by or from the district courts of the several counties above named or under order of said courts, and made returnable to the terms of said courts as they are now fixed by law, shall be returnable to the next ensuing terms of said courts in each county as they are prescribed by this act, and all such writs, process, and bonds above mentioned are hereby legalized and validated to all intents and purposes as if the same had been returnable to the term of said courts as the terms thereof are herein prescribed. [Amendment February 15; April 1, 1889; 21 Leg. p. 159.]

See next paragraph for change of time for holding court in Palo Pinto county.

(1.) The *twenty-ninth judicial district* shall be composed of the counties of Palo Pinto, Hood, Somervell, Erath, Hamilton, and Coryell, and the terms of the district court shall be held therein each year as follows:

In the county of Palo Pinto on the last Mondays in February and August, and may continue in session three weeks.

In the county of Hood on the third Mondays in March and September, and may continue in session three weeks.

In the county of Somervell on the fifth Monday after the first Mondays in March and September, and may continue in session two weeks.

In the county of Erath on the seventh Mondays after the first Mondays in March and September, and may continue [in] session four weeks.

In the county of Hamilton on the eleventh Mondays after the first Monday in March and September, and may continue in session three weeks.

In the county of Coryell on the third Mondays in January and July, and may continue in session four weeks.

(2.) All writs, process, and bonds, civil and criminal, which may be issued or executed up to the time this act takes effect, by or from the district courts of the several counties above named, or under order of said courts, and made returnable to the terms of said courts as they are now fixed by law, shall be returnable to the next ensuing terms of said courts in each county as they are prescribed by this act. And all such writs, process, and bonds above mentioned are hereby legalized and validated to all intents and purposes as if the same had been returnable to the term of said courts as the terms thereof are herein prescribed. [Supplement March 5; April 1, 1889; 21 Leg. p. 160.]

This act changes the time of holding court in Palo Pinto county as fixed by the act of February 15, 1889.

### §31.—THIRTY-FIRST DISTRICT.

(1.) The *thirty-first judicial district* shall be composed of the counties of Wheeler, Hemphill, Lipscomb, Carson, and Roberts, and the unorganized counties of Gray, Ochiltree, Hansford, and Hutchinson, and the terms of district court shall be held therein each year as follows:

In the county of Wheeler on the first Mondays in April and October, and may continue in session two weeks.

In the county of Carson on the second Monday after the first Monday in April and October, and may continue in session two weeks.

In the county of Roberts on the fourth Mondays after the first Mondays in April and October, and may continue in session two weeks.

In the county of Hemphill on the sixth Mondays after the first Mondays in April and October, and may continue in session two weeks.

In the county of Lipscomb on the eighth Mondays after the first Mondays in April and October, and may continue in session two weeks.

(2.) The unorganized counties of Ochiltree and Hansford are hereby attached to the county of Lipscomb for judicial purposes.

The unorganized county of Gray is hereby attached to the county of Wheeler for judicial purposes.

The unorganized county of Hutchinson is hereby attached to Carson county for judicial purposes.

(3.) The district judges and district attorneys heretofore elected and now acting for the thirty-first \* \* \* \* \* judicial district herein mentioned shall continue the exercise of their said offices respectively.

(4.) All process issued or served before this act goes into effect, returnable to the district court of any of the counties of said judicial districts, shall be considered as returnable to said courts in accordance with the terms as prescribed in this act, and all such process is hereby legalized, and all grand and petit juries drawn and selected under existing laws in any of the counties of said judicial districts shall be considered lawfully drawn and selected for the next terms of the district courts of their respective counties held after this act takes effect, and all such process is hereby legalized and validated.

(5.) All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed. [Act February 18, 1889; 21 Leg. p. 161.]

#### §32.—THIRTY-SECOND DISTRICT.

(1.) The *thirty-second judicial district* shall be composed of the counties of Nolan, Mitchell, Howard, Martin, Midland, Fisher and Scurry, and the unorganized counties of Andrews, Gaines, Dawson, Borden, Terry, Yoakum, Kent, and Garza, and the terms of the district court shall be held therein each year as follows:

In the county of Midland on the first Mondays in February and September, and may continue in session two weeks.

In the county of Martin on the third Mondays in February and September, and may continue in session one week.

In the county of Howard on the fourth Mondays in February and September, and may continue in session two weeks.

In the county of Fisher on the fifth Mondays after the first Mondays in February and September, and may continue in session two weeks.

In the county of Scurry on the seventh Mondays after the first Mondays in February and September, and may continue in session two weeks.

In the county of Nolan on the ninth Mondays after the first Mondays in February and September, and may continue in session three weeks.

In the county of Mitchell on the twelfth Mondays after the first Mondays in February and September, and may continue in session until the business is disposed of.

(2.) The unorganized counties of Gaines, Terry, and Yoakum are hereby attached to the county of Martin for judicial purposes.

The unorganized counties of Borden and Dawson are hereby attached to Howard county for judicial purposes.

The unorganized county of Andrews is hereby attached to the county of Midland for judicial purposes; and the unorganized counties of Kent and Garza be, and are hereby, attached to Scurry county for judicial purposes.

(3.) The district judges and district attorneys heretofore elected and now acting for the \* \* thirty-second \* \* judicial districts herein mentioned shall continue the exercise of their said offices respectively.

(4.) All process issued or served before this act goes into effect, returnable to the district court of any of the counties of said judicial district, shall be considered as returnable to said courts in accordance with the terms as prescribed in this act, and all such process is hereby legalized, and all grand and petit juries drawn and selected under existing laws in any of the counties of said judicial district shall be considered lawfully drawn and selected for the next terms of the district courts of their respective counties held after this act takes effect, and all such process is hereby legalized and validated.

(5.) All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed. [Act February 18, 1889; 21 Leg. p. 161.]

#### §34.—THIRTY-FOURTH DISTRICT.

(1.) The *thirty-fourth judicial district* shall be composed of the counties of El Paso, Reeves, and Presidio.

(2.) The district court shall be begun and held in said counties as follows:

In the county of Reeves on the first Mondays in March and September of each year, and may continue in session two weeks.

In the county of Presidio on the second Monday after the first Monday in March and September, and may continue in session two weeks.

In the county of El Paso there shall be begun and held three terms during each year, as follows: On the first Monday in Jan-



uary, and may continue in session until the first Monday in March. On the fourth Monday after the first Monday in March, and may continue in session until the first day of July. On the fourth Monday after the first Monday in September, and may continue in session until the first Monday in January following.

(3.) All writs and process returnable to the said courts shall be returnable to the terms of the said courts as herein fixed, and all such writs and process as have been issued, executed, and returned shall be as valid as if no change had been made in the time of holding said courts by the passage of this act.

(4.) All laws and parts of laws in conflict with this act be, and the same are hereby, repealed, and this act shall take effect from and after its passage. [Act March 30, 1889; 21 Leg. p. 164.]

### §37.—THIRTY-SEVENTH AND FORTY-FIFTH DISTRICTS.

(1.) All that part of Bexar county lying north and west of the following lines, viz: Beginning at the intersection of the International and Great Northern Railroad with the Cibolo creek on the boundary line between the counties of Bexar and Comal; thence in a southwestern direction with the center of the roadbed of said railroad to a point within the city of San Antonio where the northern boundary line of the park surrounding San Pedro springs extended west will intersect said railroad; thence from said point of intersection along said extended line east to the northwest corner of said park; thence in the same direction with said north line of said park to its northeast corner; thence east in the same direction to a point where this line will intersect Maverick street extended north to intersect this line; thence south to the northern terminus of Maverick street of said city as now laid out; thence south with said Maverick street to its intersection with the upper labor ditch of said city; thence up said ditch to where it intersects Grand avenue of said city; thence with Grand avenue to the San Antonio river; thence down said river with its meanders to its intersection with the south side of Houston street; thence with the south side of Houston street to its intersection with the east side of Soledad street at the corner of Houston and Soledad streets of said city; thence with the east side of Soledad street to a point on same where a line run through the center of the hall of the court-house of Bexar county parallel with the walls of said hall will intersect said east side of Soledad street; thence east through the center of the hall of said court-house and parallel with the walls of said hall to the San Antonio river; thence down said river with its meanders to the point where the Galveston, Harrisburg, and San Antonio Railroad crosses same; thence with said Galveston, Harrisburg, and San Antonio Railroad to the point where it crosses said International and Great

Northern Railroad; thence in southwestern direction with said International and Great Northern Railroad to its intersection with the boundary line of Bexar county, shall constitute the forty-fifth judicial district, and the district court shall be begun and holden therein as follows, viz: On the first Monday in March, and may continue in session twelve weeks; on the first Monday in June, and may continue in session four weeks; on the first Monday in September, and may continue in session twelve weeks; and on the first Monday in December, and may continue in session twelve weeks; *provided*, that nothing in this act contained shall be construed to prevent the district court of the thirty-seventh judicial district as at present constituted and now in session from continuing in session until the expiration of its term as now fixed by law.

(2.) All that part of the county of Bexar lying south and east of the line described in the foregoing subdivision (1) of this act, it being all of said county not included in said forty-fifth judicial district, shall constitute the thirty-seventh judicial district, and the district court shall be begun and holden therein as follows, viz: On the first Monday in March, and may continue in session twelve weeks; on the first Monday in June, and may continue in session four weeks; on the first Monday in September, and may continue in session twelve weeks; and on the first Monday in December, and may continue in session twelve weeks.

(3.) Said district courts of the forty-fifth and thirty-seventh judicial districts shall have concurrent jurisdiction throughout the limits of Bexar county of all matters civil and criminal of which jurisdiction is given to the district court by the constitution and laws of this state, and that the grand and petit juries shall be selected and drawn from the body of the county; *provided*, that there shall be no grand jury organized or impaneled by the said judge of the forty-fifth judicial district, but the judge of the thirty-seventh judicial district shall at each term of his court as provided by law organize the grand jury for said thirty-seventh judicial district, which grand jury shall have power to inquire into all offenses committed within the body of the county of Bexar, and all indictments presented by said grand jury shall be presented and returned into the district court of said thirty-seventh judicial district, and all appeals and criminal cases from the inferior courts of Bexar county shall be returnable to and filed upon the docket of the district court of the thirty-seventh judicial district.

(4.) All civil causes of which the district court of said thirty-seventh and forty-fifth judicial districts have original or appellate jurisdiction may, at the option of the plaintiff in causes to be originally filed in said courts, or at the option of appellant in cause to be appealed thereto, be filed in the district court of either the thirty-seventh or forty-fifth judicial districts.

(5.) Either of the judges of said respective courts may in his discretion transfer any cause or causes, civil or criminal, that may at any time be pending in his court, to the other district court herein provided for, by order or orders entered upon the minutes of his court, and where such transfer or transfers are made the clerk of the district court of Bexar county shall enter such cause or causes upon the docket of the court to which said transfer or transfers are made.

(6.) The judge of the thirty-seventh judicial district as heretofore constituted shall continue as the judge of the thirty-seventh judicial district as herein constituted until the expiration of the term of his office and until his successor shall be elected and qualified.

(7.) Immediately after this act takes effect the governor shall appoint a suitable person as judge of the forty-fifth judicial district, who shall hold said office until the next general election held for state and county officers and until his successor shall be elected and qualified.

(8.) If any election precinct in Bexar county, or ward in any incorporated city or town therein, shall be situated in part in each of the districts hereby created, then each voter thereof shall vote for the district judge only of the district in which said voter resides.

(9.) When this act takes effect the clerk of the district court of Bexar county shall make up a docket for each of said courts by placing on the docket of said district court of the thirty-seventh judicial district all causes that may now be on file in said court or may be hereafter filed in said court under the foregoing provisions, and by placing on the docket of said district court of the forty-fifth judicial district all such causes as may be transferred thereto by the judge of the district court of the thirty-seventh judicial district and all such causes as may be filed therein under the foregoing provisions.

(10.) All process heretofore issued or served returnable to the district court of Bexar county, shall be considered as returnable at the times herein prescribed, and all such process is hereby legalized and validated as if the same had been made returnable to the court and at the time herein prescribed.

(11.) The district attorney of the thirty-seventh judicial district as heretofore constituted shall continue as the district attorney of the thirty-seventh judicial district as herein constituted until the expiration of the term of his office and until his successor shall be elected and qualified.

(12.) All laws and parts of laws in conflict with this act are hereby repealed. [Amendment 21st Leg. p. 165.]

[The foregoing act passed the senate by a vote of 23 yeas, 6 nays; and passed the house by a vote of 41 yeas, 34 nays. It was presented to the governor for his approval on the sixth day of February, 1889, and was not signed by him nor returned to the house in which it originated with his objections thereto within the time prescribed by the constitution, and thereupon became a law without his signature.—J. M. MOORE, Secretary of State.]

## §38.—THIRTY-EIGHTH DISTRICT.

(1.) The *thirty-eighth judicial district* shall be composed of the counties of Uvalde, Comal, Kendall, Kerr, Bandera, and Medina, and the district courts therein shall be held as follows:

In the county of Uvalde on the second Monday after the first Mondays in March and September, and may continue in session three weeks, and the present term of court in Uvalde county may be continued as if commenced under this act.

In the county of Bandera on the fifth Monday after the first Mondays in March and September, and may continue in session two weeks.

In the county of Kendall on the seventh Monday after the first Mondays in March and September, and may continue in session two weeks.

In the county of Kerr on the ninth Monday after the first Mondays in March and September, and may continue in session two weeks.

In the county of Comal on the eleventh Monday after the first Mondays in March and September, and may continue in session two weeks.

In the county of Medina on the thirteenth Monday after the first Mondays in March and September, and may continue in session until the business is disposed of.

(2.) All laws and parts of laws in conflict with this act are hereby repealed. [Amendment March 30, 1889; 21 Leg. p. 168.]

## §39.—THIRTY-NINTH DISTRICT.

(1.) The *thirty-ninth judicial district* shall be composed of the counties of Knox, Baylor, Throckmorton, Haskell, Jones, Stonewall, Crosby, and the unorganized counties of King, Dickens, Motley, Lubbock, Lynn, [and] Floyd, and the terms of the district court shall be held therein in each year as follows:

In Jones county on the first Mondays in February and August, and may continue in session five weeks.

In the county of Haskell on the fifth Mondays after the first Mondays in February and August, and may continue in session three weeks.

In Throckmorton county on the eighth Mondays after the first Mondays in February and August, and may continue in session two weeks.

In Baylor county on the tenth Mondays after the first Mondays in February and August, and may continue in session three weeks.

In the county of Knox on the thirteenth Mondays after the first Mondays in February and August, and may continue in session two weeks.

In the county of Crosby on the fifteenth Mondays after the first Mondays in February and August, and may continue in session two weeks.

In the county of Stonewall on the seventeenth Mondays after the first Mondays in February and August, and may continue in session two weeks.

(2.) The unorganized county of King is hereby attached to the county of Knox for judicial purposes.

The unorganized counties of Dickens, Motley, Lubbock, Lynn, and Floyd are hereby attached to Crosby county for judicial purposes.

(3.) The district judges and district attorneys heretofore elected and now acting for the \* \* \* \* thirty-ninth judicial district herein mentioned shall continue the exercise of their said offices respectively.

(4.) All process issued or served before this act goes into effect, returnable to the district court of any of the counties of said judicial districts, shall be considered as returnable to said courts in accordance with the terms as prescribed in this act, and all such process is hereby legalized, and all grand and petit juries drawn and selected under existing laws of any of the counties of said judicial districts shall be considered lawfully drawn and selected for the next terms of the district courts of their respective counties held after this act takes effect, and all such process is hereby legalized and validated.

(5.) All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed. [Act February 18, 1889; 21 Leg. p. 161.]

#### §40.—FORTIETH DISTRICT.

(1.) The counties of Ellis, Rockwall, and Kaufman shall be, and the same are hereby, constituted the *fortieth judicial district*, and the district courts therein shall be held as follows:

In the county of Ellis on the first Mondays in March and September, and may continue in session eight weeks.

In the county of Rockwall on the first Mondays in May and November, and may continue in session three weeks.

In the county of Kaufman on the fourth Mondays in May and November, and may continue in session seven weeks.

(2.) All process heretofore issued or served returnable in any of the counties of said judicial district as heretofore prescribed by law, shall be considered as returnable at the times herein prescribed, and all such process is hereby legalized and validated as if the same had been made returnable at the time herein prescribed. [Amendment April 3, 1889; 21 Leg. p. 169.]

## §41.—FORTY-FIRST DISTRICT.

(1.) The terms of the district court in the several counties comprising the *forty-first judicial district* shall be held as follows:

In the county of Jeff Davis on the second Monday before the first Mondays in March and September, and may continue in session two weeks.

In the county of Brewster on the first Mondays in March and September, and may continue in session two weeks.

In the county of Pecos on the third Monday after the first Mondays in March and September, and may continue in session one week.

In the county of Val Verde on the fourth Monday after the first Mondays in March and September, and may continue in session two weeks.

In the county of Kinney on the sixth Monday after the first Mondays in March and September, and may continue in session three weeks.

In the county of Edwards on the ninth Monday after the first Mondays in March and September, and may continue in session two weeks.

In the county of Maverick on the eleventh Monday after the first Mondays in March and September, and may continue in session until the business is disposed of.

(2.) All writs and process heretofore returnable to the district courts of the several counties comprising the *forty-first judicial district* shall be returnable as herein provided, and shall be as valid and binding as though no change had been made in the times for holding the courts therein.

(3.) All laws and parts of laws in conflict with this act be, and the same are hereby, repealed. [Act February 23, 1889; 21 Leg. p. 170.]

§§44, 45.—See sections 14, 37, *ante*.

## §46.—FORTY-SIXTH DISTRICT.

(1.) The *forty-sixth judicial district* shall be composed of the counties of Donley, Greer, Childress, Hardeman, and Wilbarger, and the unorganized counties of Cottle, Hall, Briscoe, Armstrong, and Collingsworth, and terms of the district court shall be held therein each year as follows:

In the county of Donley on the second Mondays in January and July, and may continue in session three weeks.

In Childress county on the fourth Mondays after the first Mondays in January and July, and may continue in session two weeks.

In Greer county on the sixth Mondays after the first Mondays in January and July, and may continue in session three weeks.

In Hardeman county on the ninth Mondays after the first Mondays in January and July, and may continue in session four weeks.

In Wilbarger county on the thirteenth Mondays after the first Mondays in January and July, and may continue in session until the business is disposed of.

(2.) The unorganized counties of Cottle and Collingsworth are hereby attached to Childress county for judicial purposes.

The unorganized counties of Armstrong, Briscoe, and Hall are hereby attached to Donley county for judicial purposes.

(3.) Immediately after the taking effect of this act the governor shall appoint a suitable person as district attorney and a suitable person as district judge in \* \* said forty-sixth \* \* \* judicial districts, who shall hold their office until the next general election, at which time a district judge and a district attorney shall be elected in each of said districts and at subsequent elections according to existing laws.

(4.) All process issued or served before this act goes into effect, returnable to the district court of any of the counties of said judicial districts, shall be considered as returnable to said courts in accordance with the terms as prescribed in this act, and all such process is hereby legalized, and all grand and petit juries drawn and selected under existing laws in any of the counties of said judicial districts shall be considered lawfully drawn and selected for the next terms of the district courts of their respective counties held after this act takes effect, and all such process is hereby legalized and validated.

(5.) All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed. [Act February 18, 1889; 21 Leg. p. 161.]

#### § 47.—FORTY-SEVENTH DISTRICT.

(1.) The *forty-seventh judicial district* shall be composed of the counties of Potter, Hale, Oldham, and the unorganized counties of Dallam, Sherman, Moore, Hartley, Deaf Smith, Randall, Parmer, Cochran, Hockley, Bailey, Lamb, Swisher, and Castro, and terms of the district court shall be held therein as follows:

In Potter county on the first Mondays in March and September, and may continue in session four weeks.

In Hale county on the first Mondays in April and October, and may continue in session three weeks.

In Oldham county on the first Mondays in May and November, and may continue in session until the business is disposed of.

(2.) The unorganized counties of Sherman, Moore, and Randall are hereby attached to Potter county for judicial purposes.

The unorganized counties of Hockley, Cochran, Bailey, Lamb, and Swisher are hereby attached to Hale county for judicial purposes.

The unorganized counties of Parmer, Castro, Deaf Smith, Hartley, and Dallam are hereby attached to Oldham county for judicial purposes.

(3.) Immediately after the taking effect of this act the governor shall appoint a suitable person as district attorney and a suitable person as district judge in \* \* said \* \* forty-seventh judicial district, who shall hold their office until the next general election, at which time a district judge and a district attorney shall be elected in said district and at subsequent elections according to existing laws.

(4.) All process issued or served before this act goes into effect, returnable to the district court of any of the counties of said judicial districts, shall be considered as returnable to said courts in accordance with the terms as prescribed in this act, and all such process is hereby legalized, and all grand and petit juries drawn and selected under existing laws in any of the counties of said judicial districts shall be considered lawfully drawn and selected for the next terms of the district courts of their respective counties held after this act takes effect, and all such process is hereby legalized and validated.

(5.) All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed. [Act February 18, 1889; 21 Leg. p. 161.]



## TITLE 5.—APPRENTICES.

ARTS. 18 to 41. See Civil Statutes.

## TITLE 6.—ARBITRATION.

### ART.

42. See Civil Statutes.  
 43. Agreement to arbitrate, requisites of. *Annotated.*  
 44. See Civil Statutes.  
 45. Day of trial designated, how. *Annotated.*

### ART.

- 46 to 49. See Civil Statutes.  
 50. Umpire chosen, when. *Annotated.*  
 51. Appeal must be expressly reserved. *Annotated.*  
 52 to 56. See Civil Statutes.

### ART. 43. Agreement to arbitrate, requisites of.

(1.) Neither pleadings or process are necessary. A substantial compliance with the statute being all that is required. An agreement which describes the parties, the subject matter, selects arbitrators and provides for the selection of an umpire is sufficient. *Alexander v. Mulhall*, 1 U. C. 764.

### ART. 45. Day of trial designated, how.

(1.) Filing the agreement with the clerk before the arbitration and his presiding at the trial may be waived. *Alexander v. Mulhall*, 1 U. C. 764.

### ART. 50. Umpire chosen, when.

(1.) It is sufficient if the arbitrators were sworn, and the award is signed by one of the arbitrators originally selected, and the umpire. *Alexander v. Mulhall*, 1 U. C. 764.

### ART. 51. Appeal must be expressly reserved.

(2.) A plea to set aside an award is insufficient if it fails to specifically and distinctly set out the fraud, misconduct or mistake of the arbitrators complained of. *Alexander v. Mulhall*, 1 U. C. 764.

## TITLE 7.—ARCHIVES.

### CH. 1.—ARCHIVES OF THE GENERAL LAND OFFICE.

#### ART.

57. See Civil Statutes.  
 58. Effect to be given to archives deposited in the general land office. *Annotated.*

#### ART.

- 59, 60. See Civil Statutes.

### ART. 58. Effect of archives.

(1.) The fourth section, of article thirteen, of the state constitution, which, among other things, excludes as evidence of title to land any claim originating prior to the thirtieth of November, 1835, which has not been recorded in the county or archived in the general land office has no application to the transcript of the *vista general* of 1767 concerning the city of Laredo, deposited in the land office before the adoption of the constitution. Nor is the admissibility in evidence of copies from the land office of such transcripts affected by article fifty-eight of the Revised Statutes. *Railway v. Jarvis*, 69 T. 527.

### CH. 2.—OTHER PUBLIC ARCHIVES.

ARTS. 61 to 65. See Civil Statutes.

## TITLE 7a.—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

<b>ART.</b>	<b>ART.</b>
65a. Assignment, how made and construed. <i>Annotated.</i>	65g. Statement of claim, when and how filed. <i>Annotated.</i>
65b. Inventory and affidavit to be annexed. <i>Annotated.</i>	65h, 65i, 65j, 65k, 65l, 65m, 65n, 65o, 65p, 65q. See Civil Statutes.
65c. Assignment for benefit of accepting creditors. <i>Annotated.</i>	65r. Mortgage, etc., of merchandise void, when. <i>Annotated.</i>
65d, 65e. See Civil Statutes.	65s. Preference of a creditor in an assignment void. <i>Annotated.</i>
65f. Assignee, qualifications and duties of; fraud will not defeat assignment. <i>Annotated.</i>	

### ART. 65a. Assignment, how made and construed.

(1.) The object of this act is not to invalidate all such assignments as failed to conform strictly to its requirements, but to subject all, as far as practicable, to its operation, in order that the assigned property may be administered, and its proceeds distributed according to its requirements. *McCart v. Maddox*, 68 T. 456.

(2.) A deed of assignment which in the body of the instrument uses the partnership name, but is signed with the names of the individual members who compose the firm, and purports to convey all the property of the assignors of every description, conveys the property of the partnership as well as that of the individual members of the firm, and is not vitiated by a clause providing for releases by consenting creditors. *Shoe Company v. Ferrell*, 68 T. 633.

(3.) Every instrument, purporting to be a general assignment for the benefit of creditors, is governed as to its force and effect, the validity of its provisions, and the manner in which the trust created is to be administered, by the statute regulating assignments for the benefit of creditors. When the deed making such a general assignment is executed, the assignee becomes the officer of the law to administer the trust in obedience to the statute, regardless of any direction in the deed violative of its provisions.

Such an instrument, which embraces two lists of the assignor's creditors, in which all creditors are included, containing a general description of all the debtor's property, and which provides for a more specific inventory to be afterwards made, creates a statutory and not a common law assignment. The failure to swear to the schedules, by whatever motives influenced, cannot change the legal character of the instrument; nor will the failure of the assignee to give bond, or of the assignor to require one, remove the assignment from the operation and control of the statute. *Fant v. Elsbury*, 68 T. 1.

The failure to insert, in the deed of assignment, that the property therein specified is *all* of the assignor's estate, will not render the conveyance void upon its face. Such a conveyance, made by an insolvent debtor, will be deemed a general one, and will pass all the assignor's property subject to forced sale, whether so expressed or not. *McCart v. Maddox*, 68 T. 456.

When an assignment shows by its terms an intention to assign under the statute, and there is no provision in it indicating a design to make a partial assignment, except that the instrument after its specific designation of property conveyed, does not declare that it is all the property subject to the payment of debts, an intention to convey all will be presumed. Distinguished from *Donoho v. Fish Bros.*, 58 T. 167. *McIlhenny Company v. Miller*, 68 T. 356.

(4.) A member of an insolvent mercantile firm transferred his interest therein to his brother, and without the knowledge of his partner, who afterward learned both of the transfer and of the insolvent condition of the firm. The purchaser knew that the conveyance was in fraud of creditors. Six days after learning of such transfer and insolvency (which were then known only to the parties), the partner who had not sold out, united with the purchaser from his former partner in a deed of assignment (in which he designated such purchaser as his partner),

**T. 7a.]      ASSIGNMENTS FOR BENEFIT OF CREDITORS      Art. 65a.**

which purported to convey all their property, with a provision that accepting creditors should release their claims. In a suit between the assignee and an attaching creditor of the original partnership. *held*:

1. The facts disclose a clear case of conspiracy to defraud the creditors of the original partnership.

2. As to creditors of the original firm the goods assigned were in the same position as to ownership that existed before the fraudulent conveyance to the brother was made.

3. The assignment made by a firm thus fraudulently created, did not convey the property of the original firm or the individual property of its members.

4. It passed no more than such interest as the remaining partner of the original firm might have after payment of partnership debts, which could be nothing, since the firm was insolvent.

5. Since the partner who sold his interest did not join in the assignment, no release of creditors could be exacted, for such release can be required only when all the partnership property, as well as the individual property of the members composing the insolvent firm, passes by the deed of assignment.

6. Objecting creditors could enforce their demands against the partnership property, disregarding the attempted assignment.

7. The goods were subject to attachment. *Cleveland v. Battle*, 68 T. 111.

An assignment requiring releases from creditors, when made by a member of a firm, in the firm name, and individually, in which he is not joined by his co-partner, is void as to creditors.

If the maker of an assignment for the benefit of creditors has represented another as being a member of his partnership firm, and he afterwards makes an assignment for such partnership, in which such other does not join, then, even though no partnership existed, the assignment is void as to creditors to whom such representations were made. *Baylor County v. Craig*, 69 T. 330.

(8.) It has been held that a voluntary assignment, executed with apt words to convey lands in a foreign jurisdiction, and in conformity with the laws of such jurisdiction, does not operate as a conveyance of real property situate beyond the limits of the state where the assignment was executed, as against creditors resident within the state where the property is situated; yet such an instrument may, as between the assignor and assignee, and those claiming under the latter, pass title, whether the assignment was a statutory one or not; *provided*, it contained apt words to convey all the property of the grantor. It is no objection to the certainty of description in such an assignment that it does not specifically describe each item of property conveyed. If it purports to convey all the property of the partnership firm making it, and that of each individual member thereof, wherever situate, it becomes a matter of evidence as to what particular property the partnership and each individual member thereof owned when the assignment was executed. *Harvey v. Edens*, 69 T. 420.

(9.) A vendor who has been induced by the fraudulent representations of his vendee to sell him goods, may recover them from one holding them under an assignment made by such vendee for the benefit of creditors. Such an assignee is not protected as a *bona fide* purchaser. *Rohrbough v. Leopold*, 68 T. 254.

(12.) An insolvent debtor who has assigned for the benefit of creditors, and at the time of such assignment had a homestead in which his family resided, cannot afterwards claim homestead rights in another piece of property which he had begun to improve with a view of making it a home, but did not occupy as such at the time of the assignment.

Abandonment of a homestead occupied as such, cannot be accomplished by mere intention; there must be a discontinuance of the use, coupled with an intention not again to use as a home, to constitute abandonment, and without the abandonment of an existing homestead no right can exist to fix that character to another property, unless it be by way of addition to the existing homestead.

This case distinguished from *Franklin v. Coffee*, 18 T. 417; *Barns v. White*, 5 T. 628; *Swope v. Stanzenberger*, 59 T. 390, and *Gerdner v. Douglass*, 64 T. 79.

The rule applicable to a residence homestead applies also to the business homestead. *Archibald v. Jacobs and Wife*, 69 T. 248.

When an assignment for the benefit of creditors is made the law becomes part of the deed of assignment, and will control the assignee in the administration of the assets, although some of the terms of the deed are at variance with the law.

**T. 7a.]      ASSIGNMENTS FOR BENEFIT OF CREDITORS. Arts. 65b-f.**

If it be shown that creditors of the individual members of the firm are in no way provided for in the assignment, such omission would not avoid it, and the individual creditors could maintain their rights as creditors against the assignee.

Where, for advantage of the estate an assignee could be made to sell on credit, and a provision so directing sales would not render an assignment void. [See 66 T. 329, *Schooler v. Hutchins.*]

Nor will a fraudulent conveyance, etc., by creditor affect the assignment. The assignee or creditor may contest such sales.

Provisions for payment of costs and expenses before payment of creditors, and that if after all creditors are satisfied there be a remnant, that it be restored to the maker, are but provisions which would be supplied by the law, and are harmless.

No creditor can by attachment or garnishment divert the estate in hands of the assignee under a legal assignment, or subject it to any other than the creditors entitled under the assignment.

Garnishment proceedings against an assignee should be held over until accepting creditors are paid so as to allow the garnisher whatever priority of right his proceedings may secure. [Lovenberg v. Bank, 67 T. 440.] *Moody & Co. v. Carroll*, 71 T. 144.

**ART. 65b. Inventory and affidavit to be filed.**

(2.) A deed of assignment conveyed for the benefit of such creditors as would consent to take under it, a stock of goods, specifying their "supposed" value and locality, also the amount of "about three hundred dollars of notes and accounts," and which, "for a more particular description" of the property conveyed, referred to an inventory thereto attached as an exhibit. The exhibit read in evidence contained a list of the assignor's creditors, a specific description of his merchandise, of certain lands, his homestead and articles of furniture and domestic use, cash on hand and aggregate amount of notes due, reserving in terms from the operation of the assignment such as were exempt from forced sale. The assignee appended to the exhibit an affidavit that the schedule of his assets and indebtedness was "in all respects just and true." The assignment, though not so full and specific as the statute requires, was wanting only in those things not essential to its validity. *McIlhenny Co. v. Craddock*, 68 T. 359.

**ART 65c. Assignment for benefit of accepting creditors.**

(1.) It is not necessary that a deed of assignment should in terms make the right to releases dependent on the receipt by accepting creditors of one-third of the amount due them; that is regulated by law.

If an accepting creditor should receive less than one-third of the amount due him he would not be bound to execute a release. *McIlhenny Co. v. Craddock*, 68 T. 359.

**ART. 65f. Assignee, qualification and duties of, etc.**

(1.) When a deed of general assignment is executed, the title to the property conveyed vests in the assignee, for the purposes of the trust, under the directions of the statute. Should the assignee fail to execute the bond required by the law, creditors who do not complain and seek the appointment of another, in the manner designated by the statute, are liable, at the suit of the assignee, for their seizure and appropriation of the assets. *Fant v. Elsbury*, 68 T. 1.

An assignee, under the statute, for the benefit of creditors, cannot divest himself of his fiduciary character nor relieve himself of responsibility as such by abandoning the trust estate or by conveying it to another.

Until such assignee is relieved from his position and from his liabilities, limitation does not run in his favor against any one or more of the creditors interested in the trust estate.

At instance of one or more of the creditors an assignee delinquent as trustee may be removed by order of the district court under its equity jurisdiction, which is not dependent upon the amount of the claim of the creditor or creditors asking the protection of the trust estate in the hands of an assignee.

The right of a creditor to sue in the district court to compel the assignee to account and to pay over, etc., would not be dependent upon the amount, nor would such action against the trustee be barred by limitation.

In the petition by a creditor to remove an assignee, it was alleged that payments had been made upon the claim of the plaintiff by the assignee; on general

demurrer it will be presumed that the claim of the plaintiff had been presented under the statute, the allegation of payment including such allegation. *McIlhenny Co. v. Todd*, 71 T. 400.

**ART. 65g. Statement of claim, when and how filed.**

(3.) A trustee, at the request of the *cestui que trust*, loaned the trust money to a banking firm in which the trustee was a partner, the bank paying interest on the same. The interest was paid until one of the firm died insolvent, and afterwards the trustee, who was the surviving member, made an assignment, as such, for the benefit of those creditors who would consent to accept their proportionate share of the assets and discharge the assignor. The beneficiaries in the trust filed their claim with the assignees, but claimed priority over other creditors. The claim was allowed, but priority refused. In a suit by the *cestui que trust* against the assignees and the surviving partner to enforce priority of payment, *held*:

1. The claim occupied the same relation to the bank and its creditors as any other debt for borrowed money, and was released by acceptance of the terms of the assignment as other debts.

2. The *cestui que trust* could not, after accepting the assignment, proceed against the trustee and surviving member of the firm for payment in full, it not appearing that the trustee knew at any time that the money was unsafe in the bank.

3. The borrower of a trust fund, loaned in pursuance of the express requirements of the trust, does not thereby become a trustee for its beneficial owner.

4. When the money was borrowed by the banking firm it was divested of its trust character, and became the property of the bank as other money borrowed, and the trusteeship was not transferred to the bank because of the trustee's relation to the bank.

5. There was no error in permitting other creditors, who were interested, as such, in the property assigned, to intervene. *Mills et al. v. Swearingen et al.*, 67 T. 269.

**ART. 65r. Mortgage, etc., of merchandise void, when.**

(2.) This section recognizes the fact that mortgages, deeds of trust and other forms of lien given by a debtor will be valid notwithstanding the existence of the assignment law, if under the general rules applicable to such instruments they are not, in legal contemplation, fraudulent.

That the effect of such instruments is to give preferences to one or more creditors over others has never been held to make them fraudulent, unless under the provisions of a bankrupt or similar law they are to be so held.

The act regulating assignments did not repeal the act concerning fraudulent conveyances; and instruments giving preferences to particular creditors, which are not general assignments, are not invalid unless made under such circumstances as would invalidate them under the statutes concerning fraudulent conveyances.

An instrument which from its terms shows that it was intended as security for a debt, or debts, is to be deemed a mortgage, or in the nature of a mortgage, although it may give power to a creditor, or even to a third person, to sell the thing mortgaged, and to apply the proceeds to the debt or debts secured.

When the leading object of an instrument is to give security to a creditor, or creditors, the debtor making it will have the right at any time before the property is sold to avoid it and reclaim the property by paying the debts. Even when such a mortgage is construed to pass the legal title, a condition of defeasance will be implied if not expressed.

A conveyance of personal property made by a debtor to a creditor, with power to sell the property and pay the debt, with a reservation to the debtor of such portion of the property as may not be required to pay the debt, is a mortgage. When a like conveyance is made to a creditor, who is also the debtor's surety on other debts, for the purpose of paying debts, including those due the creditor, and those for which he is surety, the instrument is a mortgage, and it cannot be said in such a case that the surety holding the mortgage is a trustee for the creditor. [*Stiles v. Hill et al.*, 62 T. 429; *Leitch v. Hollister*, 4 Comstock, 211; *Henshaw v. Sumner*, 23 Pick. 431; *Dunham v. Whitehead*, 31 N. Y. 544; *Davidson v. King*, 47 Indiana, 372; *Gage v. Chesbro*, 49 Wisconsin, 490; *Farwell v. Howard*, 26 Iowa, 384; *David v. Gibbon*, 24 Iowa, 263; *Parcell v. Thayer*, 39 Michigan, 468.]

An instrument of the character last described, being essentially a chattel mortgage, the property conveyed would be subject to a proper levy of a writ of attachment at the suit of third parties, but could not be taken from the possession of the mortgagee. If the property were held under legal assignment, which divests the assignor of all interest, legal or equitable, in the assigned property, and vests title in the assignee for the benefit of all the creditors, no creditor could obtain by attachment a preference over the others. *Watterman v. Silberberg*, 67 T. 100.

**ART. 65s. Preference of a creditor in an assignment void.**

(3.) A clause in a deed of general assignment, which attempts to give a preference in favor of particular creditors in the distribution of the property conveyed, is violative of this article, and is void, but it does not invalidate the assignment. A general assignment for the benefit of all creditors being once made, the law, and not the wishes of the assignor, must govern in the distribution of the assets. *Fant v. Elsbury*, 68 T. 1.

## TITLE 8.—ASYLUMS.

## CH. 1.—OF THE LUNATIC ASYLUM.

## ART.

66, 66a. See Civil Statutes.  
66b. Buildings for North Texas Insane  
Asylum. *New.*

## ART.

66c. Southwestern Insane Asylum es-  
tablished. *New.*  
67 to 120. See Civil Statutes.

Art. 66b.—BUILDINGS FOR NORTH TEXAS INSANE  
ASYLUM.

## §1. Character of buildings.

There shall be erected upon the grounds belonging to the North Texas Insane Asylum at Terrell, Texas, an addition to said asylum, said addition to consist of two wings to be added to the east and west ends of said asylum respectively, which said wings shall be substantial duplicates of the east and west sections of said asylum building.

## §2. Capacity of buildings.

Said wings shall be of sufficient capacity to accommodate at least four hundred patients, and shall be provided with modern improvements for furnishing water, heat, light, ventilation, and sewerage.

## §3. Contracts for building, how made.

The governor, comptroller, and treasurer shall immediately after the passage of this act contract for the construction of said wings, according to such specifications as they may adopt, with the lowest responsible bidder, who shall give a good and sufficient bond for the completion of the buildings according to contract.

## §4. Supervision of building.

The superintendent of said asylum and a building supervisor, who shall be employed by the governor, shall supervise the construction of the said additions to said asylum provided for in this act.

## §5. Appropriation.

There shall be appropriated, out of any funds now in the treasury not otherwise appropriated, the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, for the construction of said wings and purchasing the necessary furnishings therefor; *provided*, that such wings shall be of such a character that same may be completed and amply furnished and equipped for the comfort of the inmates out of the appropriation herein made. [Act May 8, 1888; 20 Leg. S. S. p. 11.]

**Art. 66c.—SOUTHWESTERN INSANE ASYLUM  
ESTABLISHED.**

**§1. Branch insane asylum located.**

There shall be established and maintained a branch asylum for the care and treatment of the insane. The same shall be located west of the Colorado river, in southwest Texas.

**§2. Commissioners shall select site.**

The governor shall appoint three commissioners, who shall select the site for said asylum, who shall receive the sum of five dollars per day and their actual and necessary expenses incurred during the time of service, which time shall not exceed thirty days, their accounts to be certified to by the president of said board of commissioners and approved by the governor, which shall be sufficient evidence to the comptroller upon which to audit the claim and draw his warrant upon the treasurer for the respective amounts. And said board of commissioners, in selecting the site for said asylum, shall make selection with a view to its accessibility and convenience to the greatest number of inhabitants, the supply of water, building material and fuel, drainage, fertility of soil and healthfulness, together with railroad connections; and the same shall contain not less than six hundred and forty acres; and said commissioners shall take into consideration, in the selection of said site, any donations of land or money which may be offered by competitors for the site of said asylum.

**§3. Title to land taken for benefit of asylum.**

When said board shall have made their report to the governor, and the same has been approved by him, they shall, after thorough examination, if they find the title to be good and perfect, take title to the land selected in the name of the state for the use and benefit of the State Lunatic Asylum.

**§4. Board of managers, appointment and duties of.**

The governor shall appoint a board of managers to consist of five persons, citizens of the state, who shall be governed by existing laws, and whose duties shall be the same as now prescribed by title 8 of the Revised Civil Statutes.

**§5. Superintendent, appointment and duties of.**

The governor shall appoint, by and with the consent and advice of the senate, a superintendent of said asylum, whose duties, qualifications, term of office, and emoluments shall be the same as are now or may be hereafter provided by law for the superintendent of the lunatic asylum, said superintendent to enter upon the discharge of his duties as soon as said asylum is ready to be occupied by the state.



**§6. Support and management of asylum.**

The support and management of said asylum shall be the same in every respect as are provided in title 8 of the Revised Civil Statutes.

**§7. Building supervisor appointed.**

A building supervisor, who shall be employed by the governor, shall supervise the construction of all buildings erected upon said asylum grounds as provided for in this act.

**§8. Buildings constructed.**

There shall be constructed upon said grounds so selected permanent and substantial buildings sufficient to accommodate at least five hundred inmates; said building to be provided with modern improvements for furnishing water, heat, ventilation, sewerage, and lights. And the governor shall, immediately after receiving the report of the commissioner provided for in the second section of this act, advertise for plans and specifications for said buildings for sixty days; and he, together with the comptroller and treasurer, shall let the contract for the construction of buildings, according to such plan and specifications as they may adopt, to the lowest responsible bidder, who shall give a good and sufficient bond for the completion of said building according to the contract; *provided*, that the contract for construction of said buildings shall not be let prior to the first day of January, 1890.

**§9. Appropriation for land and improvements.**

There shall be appropriated, out of the general revenue of this state not otherwise appropriated, the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, for the payment of the land for a site and expenses incurred in procuring the same and the improvements herein provided for. [Act March 29; July 6, 1889; 21 Leg. p. 79.]

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**CH. 1a.—ORPHAN ASYLUM.**

Arts. 120a, §§1 to 11. See Civil Statutes.

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**CH. 2.—OF THE DEAF AND DUMB AND BLIND ASYLUM.**

Arts. 121 to 142. See Civil Statutes.

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**CH. 2a.—DEAF & DUMB, ETC., ASYLUM FOR COLORED.**

Art. 142a. See Civil Statutes.

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**CH. 3.—MODE OF FURNISHING SUPPLIES TO ASYLUMS.**

Arts. 143 to 151. See Civil Statutes.

## TITLE 9.—ATTACHMENT AND GARNISHMENT.

### CH. 1.—ORIGINAL ATTACHMENT.

#### ART.

- 152. Attachments, when and by whom issued. *Annotated.*
- 153. See Civil Statutes.
- 154. Suit must be instituted before attachment is issued. *Annotated.*
- 155. See Civil Statutes.
- 156. Bond must be given by plaintiff. *Annotated.*
- 157. See Civil Statutes.
- 158. Form of bond. *Annotated.*
- 159 to 165. See Civil Statutes.

#### ART.

- 166. Property subject to attachment. *Annotated.*
- 167. Levy on property, how made. *Annotated.*
- 167a. Notice of levy, how given. *New.*
- 168. Personal property remains in hands of officer. *Annotated.*
- 169 to 178. See Civil Statutes.
- 179. Lien of Attachment. *Annotated.*
- 180. Judgment of foreclosure. *Annotated.*
- 181, 182. See Civil Statutes.

#### ART. 152. Attachments, by whom and when issued.

(2.) The statute requires a plaintiff seeking an attachment to make an affidavit that "the defendant is justly indebted to the plaintiff, and the amount of the demand." The plaintiff, in the petition and in the affidavit, stated the same sum as the amount of the demand, and the fact that the sworn account made an exhibit and intended to be used in evidence, did not aggregate so much, did not vitiate the attachment. It has never been held that a failure to state the amount of the demand, as subsequent judicial investigation may find it to be, will vitiate an attachment. The purpose of the affidavit as to amount of the demand is chiefly to furnish data for fixing the amount of the attachment bond, and to enable the clerks so to frame the writ as to authorize the officer to whom it is directed to seize enough, and no more than will be necessary to satisfy the demand of the plaintiff and the probable cost of the suit. *Donnelly v. Elser*, 69 T. 282.

(8.) The requirements of the statute concerning affidavits for attachment are satisfied if a sufficient affidavit is made, whether it is in the form of an affidavit made separate from the petition, or on the same paper as that which contains the petition, or whether no separate affidavit of the facts upon which the attachment is prayed for is made at all, but simply alleging and swearing to the necessary facts in the petition, with appropriate prayer for attachment. [13 T. 370; 16 T. 51; 46 T. 26; 14 T. 3; 15 T. 569; 18 T. 292; 24 T. 226.] *Whitemore & Co. v. Wilson*, 1 U. C. 214.

#### ART. 154. Suit must be instituted before attachment is issued.

(7.) The petition stated that a certain part of the entire sum claimed to be due was due on January 1, 1887, and the amendment so varied this as to allege that the same sum was due before the filing of the suit on the thirteenth of that month, and it further stated when the sum not due, when the action was brought, would become due. These were matters subject to amendment at any time before the trial began, and in no manner affected the validity of the attachment. The right to an attachment does not depend on the fact that the debt sued for is due, yet it has been held that if all the claims be not due, the affidavit should show how much has matured and how much has not. [*Cox v. Rinehardt*, 41 T. 591; *Evans & Martin v. Tucker*, 59 T. 250.]

In this case these facts were alleged in the pleadings and stated in the affidavit. The plaintiff's demand was the sum alleged and sworn to be due and to become due, and the attachment did not issue for a sum greater than the aggregate of these. *Donnelly v. Elser*, 69 T. 282.

#### ART. 156. Bond must be given by plaintiff.

(2.) On a motion to quash an attachment bond, it was urged that one of the sureties on the attachment bond was a partnership and that this vitiated the bond. It cannot be assumed from the fact that one of the sureties signed as "Arnold & Shelton," that this name or style represents a partnership; for it is frequently the case that one person does business under a name or style which would indi-

state that more than one person was interested in it. It is doubtless true, that one member of a co-partnership has no authority, by virtue solely of the partnership, to bind the firm as surety in a matter not affecting the partnership itself; but it is equally true that one member of a firm, by consent of his co-partner, may bind the firm as surety in a matter in which the partnership has no interest whatever. The power of a partnership is not limited, as is that of a corporation, to the transaction of such business as falls fairly within the purposes for which it was entered into, but by consent of its members may extend to any transaction not forbidden by law. It may become surety for the payment of the debt or undertaking of another. If it be conceded that "Arnold & Shelton" was the name or style of a partnership composed of two or more persons, to hold the bond invalid because the firm appears to be the surety, it would be necessary to assume that the bond was executed by a member of the firm without the consent or authorization of his co-partners.

There is no presumption of law or fact that this is true; but, on the contrary, the presumption, in the absence of evidence to the contrary, is that the officer whose duty it was to pass upon the sufficiency of the sureties, made inquiry and satisfied himself that the person who signed for "Arnold & Shelton" had authority so to do. Such has been the ruling elsewhere. [Danforth v. Carter, 1 Iowa, Cole's Edition, 563; Churchill v. Fulliam, 8 Iowa, 47; Cunningham v. Lamar, 51 Georgia, 575.] The motion to quash is based solely on what appears upon the face of the bond, and raised no issue of fact on which an inquiry could have been made as to the authority of the person who signed the bond, to bind a partnership doing business under the name and style of Arnold & Shelton.

It would seem that in any case in which the authority of one to sign a firm name as a surety to such a bond approved and filed, is questioned, that this should be done by some plea raising an issue of fact, and not by motion which goes only to the sufficiency of the papers as they appear. [Messner v. Hutchins, 17 T. 602; Wright v. Smith, 19 T. 299; Drake on Attachments, 133.]

A bond thus signed ought to be rejected by the officer whose duty it is to approve the bond; for he ought not to imperil the rights of parties by undertaking to pass upon the power of one partner to bind his firm as surety, which will most frequently involve a question of law, and in all cases complicated inquiries of fact which he ought not to assume to decide. He must inquire who are the members of the firm, and whether they have all consented that it shall become surety in the given case. If some, or all the members, of a firm are willing to become sureties, they can sign, or cause to be signed, their own names, and thus avoid all question. Legislation upon this matter may be desirable. Donnelly v. Elser, 69 T. 282.

#### ART. 158. Form of bond.

(1.) The failure of a debtor to pay a debt does not authorize the suing out of an attachment. When, upon this ground, a principal directs his agent to sue out, and cause to be levied, an attachment, without reference to whether the grounds recognized by law as sufficient to authorize it, exist, the agent's act is the act of the principal, and his negligence, rashness or carelessness in making an untrue affidavit for an attachment, when such as to clearly show a conscious indifference to the rights of a defendant, must be deemed malicious, and the act as authorized by the principal. Blum v. Stein, 68 T. 608.

In a suit for damages, resulting from an illegal seizure under attachment of property exempt from forced sale, evidence offered by defendant, showing cause for the issuance of the attachment, is irrelevant. Brown v. Bridges, 70 T. 661.

(2.) In a suit to recover damages for the wrongful seizure of goods under attachment, evidence as to the amount for which they were insured at the time of the seizure, is inadmissible when offered for the purpose of proving their value.

Neither is evidence, that after the goods were seized under attachment by the defendant, other attachments were levied on the plaintiffs' property at the suit of other creditors, admissible in such a suit. Blum v. Stein, 68 T. 603.

In a suit for damages for wrongfully seizing, under attachment, a stock of goods, neither the inventory, the appraisement made by the sheriff, nor the report of sales, are conclusive of their value. Blum v. Stein, 68 T. 608.

In order to defend against actual damages, the very ground stated in the affidavit must be true; while it is a sufficient defense to a claim for exemplary damages that there was reasonable and probable grounds to believe the facts stated

in the affidavit were true. In an action for actual damages it was proper to exclude evidence of any ground for the attachment other than that stated in the affidavit upon which it was issued. *Blum v. Strong*, 71 T. 321.

(3.) One sued in attachment, on an affidavit made by the plaintiff, which is not true in fact, and whose money is withheld from him by process of garnishment sued out without probable cause and with malice, may recover, as actual damages, interest by way of damage at eight per cent. on the money, payment of which was prevented, and for the period of its detention, and exemplary damages, in which may be estimated the injury to defendant's credit caused by the proceedings. *Biering v. Bank*, 69 T. 599.

It is the duty of an officer, in whose hands a writ of attachment is placed, to execute it, although he may have knowledge of the insufficiency of the cause of action on which it was issued, and that it was sued out maliciously, and for performing his duty in this respect he is not liable on his official bond. *Rice v. Miller*, 70 T. 613.

(4.) A plaintiff in attachment, not having authorized his agent to seize goods of another than the defendant in attachment, and being ignorant of any wrongful seizure by his agent, is not liable for exemplary damages to the owner of goods wrongfully seized. *Heidenheimer et al. v. Sides*, 67 T. 32.

The owner of goods seized under a writ of attachment against another cannot recover from the officer levying the writ more than actual damages, if the writ was, upon its face, valid, if there was evidence that goods of the defendant in attachment were stored with goods of the plaintiff, and if the officer acted without malice, but in good faith, believing that the goods seized belonged to the defendant in attachment. *Heidenheimer et al. v. Sides*, 67 T. 32.

(5.) Want of probable cause and malice must both be apparent to authorize a recovery of exemplary damages in attachment proceedings. Want of probable cause cannot be inferred from proof of malice. However malicious the act may be, if the evidence shows there was probable cause to believe that the facts existed which authorized the attachment, no vindictive or exemplary damages can be recovered. If want of probable cause is clearly shown, the jury may infer therefrom the existence of malice, but a court should not so instruct the jury. The mere suing out of an attachment, though with malice and without probable cause, will not authorize a recovery of damages against the plaintiff in attachment, when no seizure of property is made under the writ. *Biering v. Bank*, 69 T. 599.

(6.) In an action by the defendant in attachment against the officer making the seizure, and the attachment creditor residing in another county, and brought in the county where the seizure and sale were made, it was alleged in the petition that, by collusion between the officer and the attaching creditors, an excessive levy was made, and the goods sold in bulk, etc., for the purpose of injuring the defendant. *Held*, the allegations *prima facie* gave jurisdiction over the non-resident defendant; but by plea alleging that the allegations were fraudulently made for the purpose of conferring jurisdiction, followed by issue and proof of the fraudulent character of the allegations, the suit may be abated as against the creditor residing in another county.

In such damage suit, it appearing that the attachment was regular on its face, and no irregularity in the action of the officer being shown in evidence, either in the seizure or sale of the goods levied upon, the court should have instructed the jury to find for such officer. But see the case for date of suit, etc. *Blum v. Strong*, 71 T. 321.

(7.) A petition which alleges that the defendant had, "without probable cause, wrongfully, maliciously and unlawfully, and with intent to injure, harass and oppress plaintiff, sued out a writ of attachment, and had the same levied on plaintiff's property (stating its value), and caused the same to be sold thereunder, and that plaintiff had been damaged by the unlawful seizure of his property, and by the suing out by defendant of the wrongful, willful and malicious attachment, in the sum of ten thousand dollars," states substantially a cause of action. *Brooks v. Sanger Brothers*, 69 T. 24.

(8.) A defendant, in attachment which is wrongfully and maliciously sued out, may recover such actual damages as result to him from being dispossessed of his property, though it may not have been taken by the officer into actual possession, if the levy was such as to place it in *custodia legis*. *Rice v. Miller*, 70 T. 613.

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(9.) The rule that an action to recover actual damages for the wrongful suing out and levy of an attachment must be based on the attachment bond, has not been recognized in Texas; the bond is the foundation of the liability of the sureties, but not of the principal. As against the principal a suit may be maintained against him for wrongfully suing out the attachment, either on his bond or on his liability, which, independent of the bond, resulted from his wrongful act in resorting, without just cause, to the process of attachment. *Half, Weiss & Co. v. Curtis*, 68 T. 640.

**ART. 166. Property subject to attachment.**

(3.) The proposition of the seller having been accepted by the buyer, the purchase money paid, and everything done to complete the sale, the property ceases to belong to the seller, and to be liable for his debts. *Smith & Co. v. Whitfield*, 67 T. 124.

(4.) The levy of an attachment cannot attach to an interest contracted for but not yet acquired. *Smith & Co. v. Whitfield*, 67 T. 124.

A levy of an attachment may be made on mortgaged property, subject to the prior incumbrance of the mortgage, and upon the sale of the property under the mortgage, the attachment lien follows the surplus after satisfying the mortgage. *Dahoney v. Allison & Moore*, 1 U. C. 112.

(5.) While goods seized under attachment by one officer cannot be attached by another officer, the fact that a deputy sheriff is also a constable will not affect the levy of an attachment made by him as deputy sheriff upon goods already in the sheriff's hands under former attachment. The possession of the deputy is the possession of the sheriff; his acts are the acts of his principal, and for their proper performance the principal is responsible. (See, *post*, Art. 4520, and notes.)

One who has seized under attachment two different stocks of goods, may be compelled by a subsequent attaching creditor, whose writ was levied upon but one of the stocks, to exhaust first his remedy upon the goods on which he had secured an exclusive lien; nor is this right affected by any subsequent levy made by a third party. *Heye & Co. v. Moody & Co.*, 67 T. 615.

**ART. 167. Levy on property, how made.**

(3.) It is not necessary to the validity of the levy of an attachment on real estate, that the officer having charge of the writ should go upon the ground. The lien of the attachment upon the property seized, dates from the time the officer endorses the levy on the writ. The presence of the officer on the ground intended to be levied on, and his declaration there made that he levied a writ of attachment thereon, cannot, without such endorsement, constitute a valid levy.

A writ of attachment was levied on a stock of goods, and the officer endorsed on the writ, after stating his levy on the goods, the following words: "Also store house and lots," without describing the lots. A more specific description was afterwards made by the officer in amending his levy. *Held*, that as against a creditor of the defendant who claimed under an attachment lien on the lots secured by levy afterwards made, whose attorney, directing the levy, had full knowledge of the house and lots intended to be and which were actually seized under the first levy, the first levy secured the prior lien and also against all claiming under the junior levy, with notice. *Riordan v. Britton*, 69 T. 198.

**ART. 167a. Notice of levy, how given; fees.**

Whenever an attachment is levied upon real estate, the officer levying the writ shall immediately file with the county clerk of the county or counties in which the real estate so levied upon is situated, a copy of the writ, together with a copy of so much of his return as relates to the land in said county. Said clerk shall enter in a book, to be kept for that purpose, the names of the plaintiffs and defendants in attachment, the amount of the debt, and the return of the officer in full.

Should the writ of attachment be quashed or otherwise vacated, the court in which the attachment suit is pending shall cause a cer-

tified copy of said order to be sent to the county clerk of the county or counties in which the real estate levied upon is situated. Said clerk shall, upon the receipt of the same, enter in the book aforesaid the names of the plaintiffs and defendants, and record the order of the court in full.

If the real estate levied upon is situated in any county other than the one in which the suit is pending, then, in case of failure to make the record aforesaid, the attachment lien shall not be valid against subsequent purchasers for value and without notice and subsequent lien-holders in good faith.

The county clerk of every county in this state shall keep a well bound book for the record of the matters aforesaid, and shall keep a direct and reverse index thereto, in which shall be entered the names of all the plaintiffs and defendants in the various attachments recorded by him, and the order of the court aforesaid shall be indexed in the same manner, and certified copies of such records shall be admissible in lieu of the original writ and entries.

**FEES.**—Clerks of the county court shall receive the same fees for recording the matter herein provided for as they are now allowed by law for recording deeds, to be paid by plaintiff, and said fees to be taxed as a part of the costs in the case in which the attachment is issued, and paid and collected as other costs.

**SHERIFFS** shall receive a fee of one dollar for making the copy and return herein provided for, to be taxed and collected as other costs in the suit. [Act April 3; July 6, 1889; 21 Leg. p. 80.]

**ART. 168. Custody of stock running on the range.**

(1.) Horses levied on under attachment "as they run on the range" in the county where the levy is made are constructively in *custodia legis*. If they are removed beyond the county limits by the defendant in attachment having notice of the levy, and without the consent of the officer making the levy, it is the duty of the officer to pursue and capture them, and he is not liable on his official bond for loss that may result from their recapture. *Rice v. Miller*, 70 T. 613.

**ART. 179. Lien of attachment.**

(2.) After the dissolution of an attachment the suit remains as if the writ had never issued. All proceedings under the attachment are dissolved and liens acquired by it fall with it, and impart no validity to a lien acquired by a subsequent attachment. *Smith & Co. v. Whitfield*, 67 T. 124.

**ART. 180. Judgment of foreclosure.**

(1.) A prayer for the foreclosure of the attachment lien on personal property is unnecessary; the statute directs the foreclosure when judgment is for the plaintiff in attachment. *Moss v. Katz & Mayer*, 69 T. 411.

(2.) The defendant claimed damages for the wrongful seizure of his property under the writ of attachment. The jury found for the plaintiff (under special issues), on his debt, a verdict for one thousand nine hundred and twenty dollars and nineteen cents, and for defendant, as actual damages, eight thousand one hundred and twelve dollars, "being actual damages (to defendant) six thousand one hundred and eighty-two dollars and eighty-one cents." They also found for defendant five thousand dollars exemplary damages. The proceeds arising from the sale of the attached property had been paid into court. Judgment was rendered for eleven thousand one hundred and eighty-two dollars and eighty-one cents, but no disposition was made of two thousand four hundred and ninety-three dollars and ninety cents that had been paid into court, and which resulted from the sale of the property that had been seized. *Held:*

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1. The defendant had no right to a lien on any portion of the money that had been paid into court.

2. The judgment should have been for the defendant for such an amount as remained, after deducting from the amount found as damages, the amount of his debt and the amount of money under the control of the court arising from the sale of the attached property.

3. The court was charged with judicial knowledge of the deposit made in court and that it was subject to the lien of the attachments. If the goods had been sold subject also to the lien of junior attachments, and the defendant was satisfied with his judgment which disregarded the money on deposit, then the court should have entered an order releasing the money then in custody of the court from the prior lien of the plaintiff, and left it subject to the lien of the junior attachments. *Blum v. Stein*, 68 T. 608.

## CH. 2.—GARNISHMENT.

ART.

183, 184, 185. See Civil Statutes.

186. Writ of garnishment, when and how issued. *Annotated.*

187 to 190. See Civil Statutes.

191. Effect of service of writ. *Amendment.*

ART.

192 to 210. See Civil Statutes.

211. Answer may be controverted by plaintiff. *Annotated.*

212 to 218. See Civil Statutes.

219. Costs, taxed how. *Annotated.*

220. See Civil Statutes.

ART. 186. Writ of garnishment, when and how issued.

(3.) When, in a policy of insurance, there is a stipulation that proof of loss must be made before the company can be held bound to pay, no suit can be maintained on the policy until such proof of loss is made; yet in such case a writ of garnishment may issue at the instance of the creditor of the insured—the same not being, strictly speaking, a suit, but process authorized to discover, among other things, whether some debt or obligation exists not yet matured. *Insurance Co. v. Willis & Bro.*, 70 T. 12.

ART. 191. Effect of service of writ.

From and after the service of such writ of garnishment it shall not be lawful for the garnishee to pay to the defendant any debt, or to deliver to him any effects; nor shall the garnishee, if an incorporated or joint-stock company in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment or delivery, sale or transfer, shall be void and of no effect as to so much of said debt, effects, shares or interest as may be necessary to satisfy the plaintiff's demand; *provided, however*, that the defendant may, at any time before judgment, replevy any effects, debts, shares or claims of any kind seized or garnished, by giving bond, with two or more good and sufficient sureties, to be approved by the officer who issued the writ of garnishment, payable to the plaintiff, in double the amount of the plaintiff's debt, and conditioned for the payment of any judgment that may be rendered against the said garnishee in such suit, which bond, when properly approved, shall be filed among the papers in the cause in

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the court in which the suit is pending; and in all proceedings in garnishment, where the defendant gives bond as herein provided for, such defendant may make any defense which the defendant in garnishment could make in such suit. [Amendment Feb. 9; July 6, 1889; 21 Leg. p. 1.]

**ART. 211. Answer may be controverted by plaintiff.**

(3.) When the plaintiff controverts the answer of a garnishee, and specifies in what particular he regards it untrue, under oath, it is not necessary that the allegation on which the issue is made up should be sworn to. *Insurance Co. v. Willis & Bro.*, 70 T. 12.

**ART. 219. Costs, taxed how.**

(1.) The provision for an allowance of "reasonable compensation" to the garnishee who is discharged, entitles him to re-imbursement for such sum of money as he was required to expend in protecting his interest in the garnishment proceedings; this must be held to include reasonable attorney's fees. In making the allowance the court may demand evidence showing what amount of fees had been paid or contracted for, but the trial judge must be presumed to know the value of professional services, and his failure to require evidence on that point will constitute no ground for a reversal of the judgment. The plaintiff has the right, if he should think the amount allowed by the judge too large, to offer evidence that a less amount would be reasonable. *Johnson & Co. v. Blanks*, 68 T. 495.



## TITLE 10.—ATTORNEY AT LAW.

## ART.

221 to 224. See Civil Statutes.

225. Oath of attorneys. *Annotated.*

## ART.

226 to 239. See Civil Statutes.

## ART. 225. Oath of attorneys; fees.

(3.) A contract between a city and an attorney, which, by its terms, was declared to be irrevocable, and which gave to the attorney annually, for twenty years, one-third of the rents of the ferry privileges and ferries, or of any bridge or bridges built across a river, or of the receipts of such ferries or bridges when not rented, and which mutually bound the contracting parties to do no act, and to enter into no engagement or contract, that would interfere with its terms, would, if enforced, place it beyond the power of the city to establish a free ferry, or to charge such tolls only as would defray the expenses of operating the franchise, if it so desired. Such a contract is in contravention of public policy, and cannot be enforced. An attorney having a contract with his client regarding one matter, may make a valid contract regarding another subject matter, and provide for additional compensation, yet, on account of the power which the attorney's former employment gives him to influence the actions and intents of his client, such contracts should be closely scrutinized, and when the compensation contracted for by the attorney is unreasonably large when compared with the services, it should not be allowed. See opinion for facts illustrating the propriety of the rule, and of its enforcement. *Waterbury v. City of Laredo*, 68 T. 565.

(11.) In a suit on note to recover a debt, the payment of attorney's fees, stipulated for in the note, cannot be defeated when the defendant admits that the principal and interest is due, by showing that the plaintiff had contracted, when the note was given, to release all claims for damages based on defendant's violation of the covenants in another contract, and that another suit is pending, in the same jurisdiction, against defendant for such damages. If the defendant desires a cancellation of the contract on which the suit for damages is based, and to have the questions in both suits settled in one, he should move to have the cases consolidated; failing in this he should pay the note according to its terms, set up his contract for the release of damages in the other suit, and then seek a cancellation of the former contract on which the claim for damages is based. *Lumber Co. v. Williams*, 68 T. 656.

## TITLE 11.—ATTORNEYS, DISTRICT AND COUNTY.

## CH. 1.—DISTRICT ATTORNEYS.

## ART.

240. See Civil Statutes.

241. In what districts elected. *Amendment.*

## ART.

242 to 244. See Civil Statutes.

## ART. 241. In what districts elected.

§4. Chapter 35 of the General Laws of Texas, entitled: "An act to provide for the election of a district attorney in the eighteenth judicial district of the State of Texas," be, and the same is hereby, repealed; *provided*, that the district attorney elect shall hold his office as district attorney for said district until the expiration of the term for which he is elected, after which no district attorney shall be elected for said eighteenth judicial district. [Act February 21; July 6, 1889; 21 Leg. p. 154.]

NOTE.—As to district attorneys in 46th and 47th judicial districts, see, *ante*, Art. 17, §§46, 47.

## CH. 3.—GENERAL PROVISIONS, ETC.

Arts. 249 to 261. See Civil Statutes.

## TITLE 12.—BILLS, NOTES AND OTHER WRITTEN INSTRUMENTS.

**ART.**  
**262.** Liability of parties to a bill, etc., may be fixed by suit. *Annotated.*  
**263, 264.** See Civil Statutes.  
**265.** Assignee may sue in his own name. *Annotated.*  
**266.** Non-negotiable instrument may be assigned. *Annotated.*  
**267.** See Civil Statutes.

**ART.**  
**268.** Waiver of diligence cannot be shown by parol. *Annotated.*  
**269 to 271.** See Civil Statutes.  
**272.** Want or failure of consideration a defense, when. *Annotated.*  
**273.** Liability of drawer fixed by protest, how. *Annotated.*  
**274 to 276.** See Civil Statutes.

### **ART. 262. Liability of parties to a bill, etc., may be fixed by suit.**

(5.) On the back of a note executed by a corporation, and above the indorsement of the name of the payee, were written the names of other parties, *held*:

1. In the absence of any evidence except that afforded by an inspection of the note, such indorsers would be deemed original promissors or sureties.

2. The real character of the obligation intended to be assumed by such indorsement may be shown by parol evidence.

3. The note being the individual contract of the corporation, was not changed by the indorsement into a joint contract of the indorsers and the corporation. *Latham v. Flour Mills*, 68 T. 127.

(8.) A note given for a debt by a corporation, signed with the name of the corporate agent, who wrote the word "agent" after his signature, and who had been accustomed thus to sign for the corporation, as shown in this case by the evidence, when such signature is followed by that of other persons, is the note of the corporation as the principal debtor, and, as between the corporation and the other makers, the latter are sureties. *McIlhenny Company v. Blum*, 68 T. 197.

The president of a corporation who signs the corporate name to a promissory note, and his own name, with the word "president" following, and without inserting the word "by" between the corporate name and his own, does not thereby render himself individually liable as one of the makers thereof.

A note was thus signed in which the word "we" was used preceding the word "promise" in the body of the note, which, by its terms, was made payable "at our office," *held*:

1. The presumption must prevail that the office referred to was the office of the corporation.

2. That the president referred to the corporation as a thing to be spoken of, not in the singular but the plural number. *Latham v. Flour Mills*, 68 T. 127.

(14.) When the maker of a note is notoriously insolvent it is not necessary to sue at the first term after the maturity of the note to bind the indorser.

When one guarantees the payment of a note, delay in enforcing payment by suit will only relieve the guarantor from liability to the extent that he has suffered injury by the delay. If the payment of the note is secured by a vendor's lien on land, and the land has not depreciated in value, delay in suing to enforce collection cannot relieve the guarantor. *Burrow v. Zapp*, 69 T. 474.

(15.) A draft for one thousand one hundred and fifty dollars on Vogel & Ross, of Galveston, in favor of Heard, Allen & Barnes, bankers, at Cleburne, was indorsed to Ball, Hutchings & Co., of Galveston, for collection, as follows: "Pay Ball, Hutchings & Co., or order, for account of Bank of Cleburne." Signed "Heard, Allen & Barnes." Thus received, Ball, Hutchings & Co. stamped the word "paid" on the draft, with their signature. In that condition the draft was paid by Vogel & Ross. The draft, which was attached to a bill of lading for thirty-two bales of cotton, was a forgery. In a suit by the drawees against Ball, Hutchings & Co., as indorsers, *held*:

1. The legal effect of the stamp indorsement of Ball, Hutchings & Co., who were mere agents, was a cancellation of the obligation and a receipt for the money.

2. They were not indorsers of the paper, and were not liable as such.

3. They were not liable for money had and received on the ground that payment was made to them through mistake.

4. No personal responsibility was incurred by Ball, Hutchings & Co. in the collection for their principals. *Vogel & Ross v. Ball et al.*, 69 T. 604.

**ART. 265. Assignee may sue in his own name.**

(11.) B. received a draft endorsed on him as follows: "Pay B. or order for collection for account of the City Bank of Houston. B. F. Weames, cashier." The prior endorsement on the draft showed that it had been remitted to the City Bank of Houston for collection and for account of the City Bank of Sherman. B. collected the draft, and the City Bank of Houston, which was indebted to both B. and to the City Bank of Sherman, failed; *held*, that B. could not appropriate the money collected to the payment of his debt, but that the same belonged to the City Bank of Sherman. *Bank of Sherman v. Weiss*, 67 T. 331.

The following written instrument: "Good for (here a sum of money was inserted) in merchandise at Rush Bros., Springdale, Texas," evidences no contract, and has none of the elements of negotiable paper. Its possession raises no presumption that the possessor is entitled to collect the sum named therein, but parol evidence is admissible in a suit on such an instrument to show that such a paper was delivered to an employé of Rush & Bros. as evidence that the former was entitled to receive from the latter the sum named therein for services rendered, and, when accompanied with evidence based on proper allegations that the employé who received it transferred the same to the plaintiff, and that Rush & Bros. had failed to pay, the plaintiff would be entitled to recover thereon. When the evidence shows that the paper was issued as above indicated, no recovery can be had on it by a third party, in the absence of evidence tending to show that it had been in legal contemplation assigned to him. *Rush v. Haggard*, 68 T. 674.

**ART. 266. Non-negotiable instruments may be assigned.**

(4.) A partial assignment of a chose in action is good in equity, though the legal title remains with the assignor, and such holder of the legal title may sue thereon in his own name. The equitable owner is a proper but not necessary party, unless the debtor have some legal defense as against him alone. *Railway v. Gentry*, 69 T. 625.

(5.) Though at common law an interest in a chose in action cannot be assigned so as to enable the claimant of each interest to bring suit for its collection, in equity a different rule prevails, and an assignment which conveys an interest in a chose in action may be made either by direct transfer, or by order drawn upon the particular fund. [*Goldman v. Blum*, 58 T. 630, followed, and *Caldwell v. Hartup*, 70 Pennsylvania State, 74; *Hall v. Buffalo*, 2 Abbott on Appeals, 310; *Brice v. Tuttle*, 81 N. Y. 454; *Moody v. Kyle*, 34 Miss. 506; *Field v. Mayor of N. Y.*, 6 N. Y. 179; *Burr v. Carvalho*, 4 Myl. & Cr. 690; *Row v. Dawson*, 1 Ves. Sr. 331; *Ex parte South*, 3 Swanst. 392, and other cases cited and approved.]

In equity, no interest is acquired in a chose in action by a mere order for a designated sum of money drawn against the debtor; to acquire such interest, the order must be drawn against the specific fund.

When a part of a debt is assigned, the assignee acquires a right of action in equity against the debtor, and not only a lien upon the fund but a property in the fund itself. Though he owns but an interest in the chose in action, he may enforce its collection and an equitable distribution, by suit against the debtor and the other parties in interest. The several claimants under assignments of specific interests in the debt have priority of right to payment in accordance with the dates at which their interests were acquired. [*Lindsey v. Price*, 33 T. 280, and *Frank v. Kaigler*, 36 T. 306, disapproved.] *County of Harris v. Campbell*, 68 T. 22.

(6.) An assignment of part of a chose in action, for a valuable consideration, is good in equity; it may be made by a direct transfer, or by order drawn on the particular fund, and such assignee has not only a lien on the fund, but a property in it which he may enforce by suit. [Following *Harris v. Campbell*, 68 T. 27.] *Clark v. Gillespie*, 70 T. 513.

It is the duty of the assignee of a non-negotiable instrument to promptly notify the maker of such transfer, and the maker will be protected if he pays the payee without notice of assignment, the absence of the note being reasonably accounted for. [*Daniels on Neg. Inst.*, sec. 742.] *Swearingen v. Buckley*, 1 U. C. 421.

**ART. 268. Waiver of diligence cannot be shown by parol.**

(2.) A note was executed by W. H. Williams and indorsed by him and others. The note contained the following clause: "In case of non-payment of the above note at maturity, I hereby authorize any licensed attorney to appear for me in court and to accept service," confess judgment, etc. Suit was filed and judgment confessed by an attorney and rendered against the maker and indorsers. A motion for new trial was overruled, and on appeal it was held that the note gave no power to confess judgment against any one except the maker; that it was not necessary to inquire as to whether this power would embrace others who signed the note before delivery, for the legal presumption is that the indorsers did not so sign. Their names appear after that of the payee, and the presumption of law is that they placed them there after the payee had indorsed, and that the note passed from the payee successively through the hands of the subsequent indorsers till it reached the holder. (*Rickey v. Dameron*, 48 Mo. 61; *Roberts v. Masters*, 40 Ind. 463; *Clapp v. Rice*, 13 Gray, 403; 1 *Daniel on Neg. Ins.* 711 *et seq.*; *Blatchford v. Milliken*, 35 Ill. 434)

It is true that the petition alleged that these parties signed their names before delivery; but such not being the presumption of law, parol evidence was required to prove it. Such proof is not admissible in a proceeding like this to establish anything outside of what appears upon the instrument itself. The authority to confess extends only so far as to allow judgment according to the tenor and legal effect of the note, and the plaintiff cannot vary its obligation or make parties liable to the summary judgment he is taking, who, according to the terms of the note itself, have not authorized him to take such judgment. It was held in *Heidenheimer v. Blumenkron*, 56 T. 308, that parol evidence was inadmissible to show that parties who had indorsed a note under like circumstances with the present were responsible as original promissors. That was a case where all parties were in court, and had appeared in the case; much less can this be done where the parties thus sought to be charged have had no notice of the action, and no opportunity to combat any such proof that might be offered against them. If this evidence was inadmissible, no failure of the parties defendant to appear in defense of the suit would raise a presumption that it had been introduced in support of the allegation in the petition.

This court held (56 T. 308, *supra*.) that proof that such indorsers signed before the delivery of the note, would not, in a case where their names appear as do these upon its back, make them anything else but ordinary indorsers, with all the rights and privileges belonging to that position. *Williams et al. v. Bank*, 67 T. 608.

Exceptions properly lie to a petition brought to the third term after a cause of action accrues on a non-negotiable instrument, in favor of the assignor, drawer, or indorser, when sued by the holder, when no legal excuse for the delay is set forth in the petition. *Kampmann v. Williams et al.*, 70 T. 568.

**ART. 272. Want or failure of consideration a defense, when.**

(6.) The custodian of personal property is bound to exercise proper care for its safe keeping, and is liable to the owner for an injury from the want of such care on the part of one to whom he has loaned the same. A note given by such loanee to the custodian of the property for injuries caused by the maker of the note is upon sufficient consideration. *Dolson v. De Ganahl*, 70 T. 620.

(9.) A contract under which the owner of sheep, infected with disease, agrees that another, for a specified consideration, may keep, use and shear them, is not rendered invalid as against public policy, because the owner induced the other party to drive them along the public highway to a distant range by his representations that they were not diseased. Even if the owner knew the diseased condition of the sheep, and that the other party intended to drive them along the public highway, the contract would not thereby have been void, as against public policy, the fact of such removal of the sheep forming no part of the contract.

While there is conflict of decisions on the question as to whether a contract is rendered invalid on the mere ground that one party to it may have known of the intention on the part of the other to use the subject matter thereof for an unlawful purpose, the tendency of the Texas decisions is to deny the invalidity of a contract for such cause.

A contract whereby one is permitted to select from the flock of another one thousand "picked ewes," does not necessarily imply that the sheep shall be sound and free from all disease. *Labbe v. Corbett*, 69 T. 503.

(10.) An agreement to forbear to prosecute a suit to enforce a well founded claim in law or equity, is a sufficient consideration to support a promissory note of the debtor or of a third person, when the creditor, in pursuance to such agreement, has forbore as agreed upon.

Such forbearance must be in respect of a well founded claim, and there must be some person liable to suit therefor.

Suit upon an account for two hundred and two dollars was brought against an administrator, in a justice's court; the claim had not been verified by affidavit and presented to the administrator for allowance under the statute. An attachment was also sued out and was levied upon the household property of the deceased. The administrator, upon an agreement for the dismissal of the suit and release of the attached property, assigned and delivered an obligation to pay the account sued on. Suit was brought upon this obligation. *Held*, that there was no consideration for the obligation sued on, and the petition showing all the facts, a demurrer thereto should have been sustained. *Bradenstein v. Ebenberger*, 71 T. 267.

(13.) A plea of failure of consideration in a suit to foreclose the vendor's lien on notes given for land, which alleges that defendant had been evicted from the land and repudiated the title "on the ground that the land conveyed to him in consideration therefor was not conveyed by good and sufficient title, and he has thereby lost the same and been evicted," without allegations as to the invalidity of the title or offer to surrender his deed, or make the adverse claimant a party to the suit, is insufficient. [28 T. 272; 19 T. 260; 10 T. 65; 29 T. 267; 20 T. 211.] *Linn v. Willis*, 1 U. C. 158.

An offer of a reward for the arrest of a party guilty of a particular offense, when and after it has been acted upon, is binding upon the party making the offer.

The secret motives for making the offer do not form any part of the contract with the party acting upon the offer. That the party offering expected others than the one arrested and proved guilty to be arrested, will not relieve him from his offer when acted upon.

Nor would such expectations on part of the party making the offer form part of the contract where the offer was general and payable upon the arrest and conviction of the guilty party.

It is no part of the duty of a constable to make an arrest without warrant upon a charge of burglary where the offense was not committed in the view of the officer, nor legal complaint made against the party arrested. A constable making such arrest under an offer of reward upon conviction of the party arrested, can claim the reward. *Kasling et al. v. Morris*, 71 T. 584.

#### ART. 273. Liability of drawer fixed by protest, how.

(1.) A verbal acceptance or promise to a check or bill of exchange may be enforced. Such undertaking is within the statute of frauds.

The English and American courts having decided that such acceptances were not within the statute of 29 Car. II, Cap. 3, prior to its adoption in this state, the presumption is, that it was intended that it should here receive the same construction. *Neumann v. Shroeder*, 71 T. 81.

(3.) No necessity exists for protest in order to fix the liability of an indorser on an instrument which is not negotiable. *Kampmann v. Williams et al.*, 70 T. 568.

#### ART. 276. Days of grace on bills and notes.

(3.) A draft, payable on demand, becomes due at the date of its acceptance, or as soon thereafter as demand for payment can reasonably be made. *Kampmann v. Williams et al.*, 70 T. 568.

## TITLE 13.—CARRIERS.

## CH. 1.—DUTIES AND LIABILITIES OF CARRIERS.

ART.

277. Common law governs carriers, etc. *Annotated.*278. Carriers cannot limit their responsibility. *Annotated.*

ART.

279. See Civil Statutes.

280. Must give bill of lading. *Annotated.*

281 to 284. See Civil Statutes.

ART. 277. Common law governs carriers.

(6.) In an action against a railway company for damages, for failure to furnish cars, and to receive and transport cattle, the contract being that the cattle should be received on May 19, 1884, and delay was made until May 23, and a break was caused in the track on May 21, by a violent rain storm, the break being at a place which would have been passed had the cattle been shipped at any time before the morning of the twenty-first of May; *held*, that the break in the track on twenty-first, after the breach of contract, was no defense to the action; and that the railway company was liable for all damages caused by its breach. *Railway v. McCorquodale*, 71 T. 41.

(9.) Considerations of public policy require that a company operating a sleeping car attached to a railway train, and used for the comfort and transportation of passengers, should use reasonable care to guard the passengers from theft. When a failure to exercise such care results in the loss, by theft, of such personal effects as a passenger may reasonably carry with him, the sleeping car company is liable.

The liability of the sleeping car company is not affected by the fact that the railway company, to whose train the sleeping car is attached, may receive the greater part of the money paid by the passenger for his transportation. The sleeping car company is still a carrier of passengers, and it is liable as such.

If the passenger retains the exclusive control of his baggage, the carrier is not responsible for its loss, unless such loss results from the carrier's negligence. *Pullman Company v. Pollock*, 69 T. 120.

(17.) In an action against a sleeping car company by a passenger for loss of baggage is that held by the Supreme Court of Massachusetts in the case of *Lewis v. New York Sleeping Car Company*, 28 American and English Railroad Cases, 180. In that case it is said that "while it is not liable as a common carrier, or as an inn-holder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if through want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor." Such a rule is required by public policy and by the true interests of both the passenger and the company, and the decided weight of authority supports it. [*Woodruff Sleeping Car Company v. Diehl*, 84 Indiana, 474; *Pullman Palace Car Company v. Gardner*, 3 Pennypacker, 78; *Pullman Palace Car Company v. Gaylord*, 23 American Law Register, n. s., 788.]

The fact that a railway company, to whose train a sleeping car may be attached, may not own such car, or control its internal management, and that the same may be under the control of a company who does own and operate such car, and that the minimum compensation for transportation may be paid to the company to whose train the sleeper is attached, do not deprive the company so owning and operating a sleeping car of the character of passenger carrier; for the contract of such a company is not only that the passenger may sit and sleep in the car during the journey for which he contracts, but it goes further, and binds the owner of such car to transport the passenger in it, or some like carriage, to the place of destination, the passenger having paid the fare demanded by both companies. If passengers by railway train retain the exclusive custody of their baggage, then the carrier is not responsible for its loss, unless this results from the carrier's negligence, and the failure of a passenger to use reasonable care in reference to it, will defeat his right to recover. *Pullman Company v. Pollock*, 69 T. 120.

**Art. 278. Carriers cannot limit their responsibility.**

(1.) A clause in a through bill of lading, exempting the carrier "from damages or loss by fire while in depot," made in the State of Tennessee by a connecting road, being illegal in Texas, will not be passed upon in absence of allegation and proof that such limitation was legal where executed. *Railroad v. Moody*, 71 T. 614.

(13.) A railway company is bound, as a common carrier, to receive and transport live animals, when offered for transportation from one point to another in Texas, as other property, and is liable, after receiving them, as an insurer against loss from any cause, except the act of God or of the public enemy, the act of the owner of the stock, or the vicious propensities or inherent character of the animals. This liability of a railroad company cannot be limited by special contract, even in regard to matters concerning which the parties might legally contract at common law.

Since the statutes do not forbid the making of a contract prescribing a time after which a fixed liability incurred by a common carrier shall not be enforced by suit, the only limitation on the validity of a contract fixing the time within which suit may be brought, when made on sufficient consideration, is that it be reasonable as to the period of time stipulated. A contract requiring suit to be brought within forty days next after the damage was sustained, held to have been reasonable. *Railway Company v. Trawick*, 68 T. 314.

The opinion in *Railroad Company v. Harris*, 67 T. 166, to the effect that carriers of animals are common carriers, subject to the same responsibilities imposed by law on carriers of other property, except as this is modified by the inherent character of such property; that a special contract, which by its terms purports to exempt a railway company from liability for injury in the transportation of cattle, except such as might result from the willful negligence of a railway company, cannot be enforced, adhered to. *Railway v. Cornwall*, 70 T. 611.

**Art. 280. Must give bill of lading.**

(4.) A carrier may require the production of a bill of lading before he delivers the goods, and he may, before delivery, when the consignee refuses to receipt for the goods. But a carrier cannot rightfully refuse to deliver the goods, after inspecting the bill of lading, on the ground that the bill is not surrendered to him, if the consignee tenders the freight charges as contained in the bill, and executes his receipt for the goods. *Dwyer v. Railway*, 69 T. 707.

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**CH. 2.—DISPOSITION OF UNCLAIMED OR PERISHABLE PROPERTY.**

**Arts. 285 to 289. See Civil Statutes.**

T. 14, 15.] CERTIORARI—CESSION OF LANDS, ETC. Arts. 290-333a.

## TITLE 14.—CERTIORARI.

### CH. 1.—CERTIORARI TO THE COUNTY COURT.

ART.

290. *Certiorari* issued to county court, when. *Annotated.*

291. See Civil Statutes.

ART.

292. Writ granted on execution of bond for costs. *Annotated.*

293 to 298. See Civil Statutes.

ART. 290. *Certiorari* to county court, when.

(2.) A proceeding by *certiorari*, issuing out of the district court, to correct orders or a judgment of the probate court, under which a hearing is had *de novo*, is in no respect collateral in its character.

Though article 2217, *post*, provides, also, for a bill of review to correct orders and judgments of the probate court, it does not follow that such means of correcting improper judgments should be resorted to before seeking to accomplish the same result by *certiorari*. *Linch v. Broad*, 70 T. 92.

ART. 292. Writ granted on execution of bond for costs.

(1.) If, in a proceeding by guardian and ward to remove a cause by *certiorari* to the district court, both the guardian and the minor ward sign the cost bond, the fact that the minor signed it in his own name, with sureties, will not vitiate the bond. No bond for cost could rightfully have been required of the guardian, and if required, the sureties became bound, even without the signatures of guardian or ward. *Linch v. Broad*, 70 T. 92.

### CH. 2.—CERTIORARI TO JUSTICE'S COURT.

ARTS. 299 to 318. See Civil Statutes.

## TITLE 15.—CESSION OF LANDS TO THE UNITED STATES.

ART.

319 to 333. See Civil Statutes.

333a. Jurisdiction granted over land in Texarkana. *New.*

ART.

334, 335. See Civil Statutes.

ART. 333a. Jurisdiction granted to the United States over land in Texarkana.

§1. Exclusive jurisdiction over the site and grounds for a public building in the town of Texarkana, Bowie county, Texas, be ceded to and vested in the United States of America, so long as said site and grounds shall be owned or used by the United States of America, for all purposes, except the administration of the criminal laws of the State of Texas and the service of civil process therein.

§2. Lot described.

That the site and grounds ceded to the United States of America by this act are described as follows, to-wit: All of fractional block No. (50) fifty, in Trigg's addition to the town of Texarkana, Texas, including all the streets, alleys and State Line avenue adjoining said fractional block up to the state line between the States of Texas and Arkansas. [Act March 21, 1889; 21 Leg. p. 86.]

(5—Sup. Tex. Stat.)

65



T. 16, 17.] CHANGE OF NAME—CITIES AND TOWNS, ETC. Art. 340b.

## TITLE 16.—CHANGE OF NAME.

ARTS. 336 to 339. See Civil Statutes.

## TITLE 17.—CITIES AND TOWNS; ALSO, VILLAGES.

### CH. 1.—GENERAL PROVISIONS RELATING TO CITIES.

ART.

340, 340a. See Civil Statutes.

340b. Town or village may accept in lieu  
of existing charter. *Annotated.*

ART.

341 to 343. See Civil Statutes.

ART. 340b. Town or village may accept in lieu of existing charter.

(1.) The inhabitants of a given territory have no inherent power to create therein a municipal corporation. This can be done only by a special act of the Legislature, or by compliance with the general law providing the manner in which the inhabitants may give life to such a corporation. The inhabitants of a municipal corporation are as powerless to dissolve it, unless this be done in the mode prescribed by law, as are they to create such a corporation in a mode not prescribed by law.

The petition shows that the town of Nacogdoches was duly incorporated under the act of January 27, 1858, and that corporation must be deemed to exist until, in some manner known to the law, it is dissolved. The inhabitants may have failed to elect proper officers since the year 1882, but under the great weight of authority this does not operate a dissolution. (Dillon on Municipal Corporations, 166.)

The inhabitants of the town still have the capacity to elect the requisite municipal officers; and the manner in which such election may be ordered and held, if not expressly provided in the law under which incorporation was had, is provided for by general laws now in force in this state. Such officers existing, the inhabitants of the town, by a two-thirds vote of the town council, may incorporate under the general law now in force, and such action will repeal all former charters, whether existing under special act or by virtue of the general law enacted January 27, 1858.

Any effort on part of the inhabitants of territory, within an existing corporation, otherwise than as so provided, is without authority, and of no legal effect. So, also, any effort to increase the boundaries of such corporation otherwise than as provided by existing statutes.

A reorganization, in 1837, of the territory of a town, incorporated in 1859, under the act of January 27, 1858, was void. *The State v. Dunson*, 71 T. 65.

### CH. 2.—OFFICERS AND THEIR ELECTION.

ARTS. 344 to 355. See Civil Statutes.

### CH. 3.—DUTIES AND POWERS OF OFFICERS.

ARTS. 356 to 367. See Civil Statutes.

T. 17, CH. 4.] CITIES AND TOWNS; ALSO, VILLAGES. Arts. 370, 374.

## CH. 4.—GENERAL POWERS AND DUTIES OF THE CITY COUNCIL.

**ART.**

368, 369. See Civil Statutes.

370. Shall control the finances and property of the city. *Annotated.*

371 to 373. See Civil Statutes.

374. Council may provide the city with water. *Annotated.*

**ART.**

375. Control of streets, alleys, etc. *Amendment and annotated.*

376 to 419. See Civil Statutes.

420. Power over the finances of the city. *Annotated.*

421. City bonds specify what. *Amendment.*

422 to 424. See Civil Statutes.

**ART. 370. Council shall control the finances and property of the city.**

(1.) The ownership by a city of a ferry franchise involves a public trust, and it must be administered by those to whom the affairs of the municipal government are committed, as in their discretion the public interest may require. *Waterbury v. City of Laredo*, 68 T. 565.

**ART. 374. Council may provide the city with water, etc.**

(1.) Construing the charter of the city of Brenham, granted February 4th, 1873, in connection with articles 629 and 630, of the Revised Statutes, that city had power to enter into a contract by which it might be supplied with water. This power was derived from the charter alone, to be exercised by the city for the public good, and not under any private corporate right or proprietorship.

An ordinance of the city of Brenham provided "that there is hereby given and granted to the Brenham Water Company the right and privilege, for the term of twenty-five years from the date of adoption of this ordinance, of supplying the city of Brenham and the inhabitants thereof with water for domestic and other uses, and for the extinguishment of fires." Construing this part of the ordinance in connection with other portions of it, and in connection with its fourteenth section, which, in effect, provided that the ordinance should be a contract between the city and the water company, whenever the company accepted the same in writing, *held*:

1. That the language employed in the ordinance clearly evinced the purpose to confer on the water company the exclusive right to furnish the city of Brenham and its inhabitants with whatever water might be needed or necessary to be furnished by such a system, for a period of twenty-five years.

2. The charter of the city conferred on the city the power to furnish the water, and this included the power to contract with some other corporation having power to so contract, or with some other person, to supply the water; the charter of the water company expressly authorized it to contract to supply the water.

3. A municipal corporation may exercise, 1, powers expressly granted by charter; 2, those powers necessarily or fairly implied in or incident to the powers expressly granted; and 3, powers essential to the declared objects and purposes of the corporation. Any fair, reasonable doubt as to the existence of a power must be resolved by the courts against the corporation.

4. No express power was conferred on the city of Brenham to make a contract giving to the water company the exclusive right to furnish the city and its people with water at a fixed rate for twenty-five years, and the power to make such a contract was not necessary or essential to the exercise of powers expressly granted.

5. Powers are conferred on municipal corporations for public purposes, and they can neither be delegated nor bartered away. Such corporations have no power either to cede away or embarrass their legislative or governmental powers, either through the agency of by-laws or contracts with others, so as to disabie them from the performance of their public duties.

6. The contract evidenced by the ordinance above referred to, and by its acceptance by the water company, would have the effect not only to embarrass the city government in the exercise of the power conferred on it, but to withdraw from it the right to provide water in any other authorized way, for public purposes and for the inhabitants of the city, which was the sole purpose for which

the power to erect, maintain and regulate water works was given to it. This would result from the exclusive right which, from the terms of the ordinance, it intended to confer.

7. The power of a city government to make such a contract as would disable it from controlling in future, as it might deem best, municipal affairs to which it refers, cannot be implied from the express delegations of power to contract regarding the particular subject matter.

8. When a contract is made by a city corporation not warranted by its charter powers, the city council have at all times the right to declare it null, and to refuse compliance with it.

9. The city of Brenham had no power to make the contract.

[*Richmond County Gas Light Company v. Middletown*, 59 New York, 231; *Garrison v. City of Chicago*, 7 Bissell, 486; *Canal Company v. St. Louis*, 2 Dillon, 84; *City of Indianapolis v. Gas Light Company*, 66 Indiana, 400; *City of Valparaiso v. Gardner*, 7 American and English Corporation Cases, 629, and *Water Works Company v. Atlantic City*, 6 Atlantic Reporter, 24, reviewed.]

The very object contemplated by the Legislature in compelling, by the terms of a city charter, frequent elections of city officers by the people, was to secure to them such control as would make the city government reflect as near as possible at all times the popular will. This object would be defeated if a city council could, even in dealing with an express power, barter away by contract its exercise for a long period of years, so as to deprive their successors of all discretion over the subject matter.

In making permanent improvements, authorized by charter, contracts must be sustained, when the improvement remains the property of the city, to be controlled and dealt with as from time to time it may determine.

The Constitution provides: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." The city of Brenham made a contract in which it gave the exclusive right to sell water to the city for public purposes to a company on specified terms for the period of twenty-five years, with the resulting obligation on the city to buy for public use. It gave also to the company the exclusive right to sell to the inhabitants of the city, for the same period, water for private uses. *Held*:

1. A grant which gives to one person, or to an association of persons, an exclusive right to buy, sell, make or use a designated thing or commodity, or to pursue a designated employment, creates a monopoly.

2. The right to exercise the exclusive privilege need not extend to all places; the monopoly exists if it operates in and to the hurt of one community. It need not continue indefinitely, so as to amount to a perpetuity; the monopoly exists, if the privilege be exclusive for a period of time.

3. Such an exclusive right as was attempted to be granted by the city of Brenham would cut off future competition in supplying the city with water for a quarter of a century, tend to enhance the price of an article of necessity, and would constitute, within the meaning of the constitution, a monopoly.

4. Though the use of a street to lay down water mains may not be a matter of common right, yet when it becomes a means whereby an exclusive right is claimed to sell water and to compel the city and its inhabitants to buy, it can give no sanction to a contract whereby the use to be made of such mains will result in a monopoly.

5. A franchise to supply a city with water will ordinarily involve the right to use its streets, but from its very nature it is subject at all times to control.

[*Gas Light Company v. City Gas Company*, 25 Connecticut, 18; *State v. Cincinnati Gas Light Company*, 18 Ohio, 293; *City of Memphis v. The Memphis Water Company*, 5 Heiskel, 525; *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 650; and *Crescent City Gas Light Company v. New Orleans Gas Light Company*, 27 Louisiana Annual, 138-147, reviewed.]

An exclusive right in a municipal corporation to operate water works is distinguished from such an exclusive right held by a private corporation, in this, that in the former case the right is exercised by and for the people, not for profit but for the public welfare, and the correction of its oppressions and abuses in its management is in their hands; while, in the latter case, the right is exercised for private gain, with every incentive to oppress those who, under such a contract as was made with the city of Brenham, would be powerless to relieve themselves if the contract should be held valid. *Brenham v. Water Company*, 67 T. 543.

**ART. 375. Control of streets, alleys, etc.**

To have the exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, extend, establish, regulate, grade, clean, and otherwise improve said streets; to put drains or sewers therein, and to prevent the encumbering thereof in any manner, and to protect the same from encroachment or injury; and to cause all able-bodied male inhabitants above eighteen years of age, except ministers of the gospel, to work thereon not exceeding five days in any one year, or furnish a substitute or a sum of money (not to exceed one dollar for each day's work demanded) to employ said substitute, and to enforce the same by appropriate ordinances; and to regulate and alter the grade of premises, and to require the filling up and raising of the same; and such city council shall also have power to alter or vacate the alley in any block of ground within the city, upon the written application of the owner of the block, or if there be more than one owner of such block, then upon the written application of all the owners thereof uniting in such application, and such alley so vacated shall thereupon revert to and become the property of the owner of the block of which it was a part, or if more than one, then to the owners of the adjoining lots therein, each extending to the centre of the alley so vacated. [Amendment March 30; July 6, 1889; 21 Leg. p. 1.]

**ART. 375. Control of streets, alleys, etc.**

(1.) In 1844 the town of Brenham was laid off into blocks, lots, streets, alleys and squares. Lots were sold, and in the conveyances to the purchasers they were designated by their number and block only, as they appeared on the map of the town. On September 23d, 1871, an ordinance was passed by the city authorities of the city of Brenham, reciting that the alleys were a public nuisance, and petitioning the Legislature to authorize their sale. An act was passed accordingly, and on March 27th, 1872, the mayor sold a portion of one of the alleys and executed a deed therefor. The purchaser began closing the alley by building a wall across it, and the owners of the lots abutting on the alley sued out an injunction restraining him from closing the alley. *Held:*

1. The owners of the lots on the alley, or their vendors, having purchased with reference to the map or plan of the city, acquired as appurtenant thereto a property in all such rights, easements, privileges and servitude, represented on such map as belonging to them, in the alley on which the lots abutted, which neither the Legislature nor city authorities could take away, except in modes prescribed by law upon making compensation therefor.

2. The conveyance from the city to a portion of the alley passed no title thereto, and the purchaser was properly restrained from closing it. [Lamar Co. v. Clements, 49 T. 355; Warren v. Lyons City, 22 Iowa, 351; Haynes v. Thomas, 7 Ind. 38; Dillon on Mun. Corp. 630.] Dwyer v. Hosea, 1 U. C. 596.

**ART. 420. Power over the finances of the city.**

(2.) An incorporated town exceeded its powers by contracting to issue its bonds in the purchase of ground for public free school purposes. Afterwards the town adopted the provisions of the Revised Statutes (Title 17), and became under general law a city. As a city it could have issued the bonds under the limitations of the statute. Suit was brought against the city to compel specific performance of the contract with the former town, to issue bonds; if issued, and added to the existing debt against the city, including railway subsidy bonds, the city debt would exceed six per cent. of the taxable values of the city, *held:*

1. The purchase was not ratified by the act of the corporation when it adopted the permission of the statute and became a city.

2. The city had no power to ratify a purchase involving the issuance of bonds in contravention of the authority of the town when the contract was made, and which, if ratified, would involve the issuance of bonds in excess of the amount the city could lawfully issue. *Waxahachie v. Brown et al.*, 67 T. 519.

On the tenth of April, 1877, the city council of the city of Paris passed an ordinance authorizing the purchase of a steam fire engine, cart and hose, and on the same day negotiated the purchase, paying part cash, and also on the same day issued, under authority of the ordinance, its coupon interest-bearing bonds for the deferred payment, which on their face referred to the ordinance by its number, date and caption, as the authority for their issuance. The ordinance provided for an annual tax of one-tenth of one per cent. on the value of the taxable property of the city to pay the bonds and interest, and declared that no part of the current expense fund, and no part of the interest and sinking fund provided for the liquidation of pre-existing city debts, should be held responsible for the payment of the debt authorized by the ordinance, and that the acceptance of the bonds by the owner of the fire engine, etc., should be construed as a consent to this provision. In a suit against the city by a purchaser of the bonds to recover the amount of the matured coupons, *held*:

1. The passage of the ordinance, the purchase of the property and the execution of the bonds, being contemporaneous, must be construed as one transaction.

2. The recitations contained in the face of the bonds, charged the purchaser thereof with notice of the terms of the ordinance and contract, and estopped him from claiming that the current expense fund of the city was liable for the payment of the bonds.

3. The validity of the contract depended on the authority of the council to levy the tax provided for by the city ordinance.

4. The act of March 15th, 1875 (Rev. Stat., 420), was in force when the contract was made, except in so far as it was repugnant to section forty-eight of the general provisions of the constitution.

5. In view of the state of the pleadings and evidence, the city of Paris must be held to have been a city at the time the contract was made, having a population of ten thousand inhabitants or less.

6. Under section four, of article eleven, and section nine, of article eight, of the state constitution, when the city of Paris had levied twenty-five cents on the hundred dollars' worth of its assessed taxable property for current expenses, it could levy no other tax, except for the purposes mentioned in the constitution.

7. The Legislature had no power to authorize the city of Paris to levy a special tax to pay the bonds or coupons, when she had already levied one-fourth of one per cent. for current expenses.

8. The contract made for issuance of these bonds was void for want of power in the city to make the contract.

9. The bondholder could not recover on an implied contract to pay for the property. When the law implies a contract to pay, the implication is an immediate payment, and not at a future date; after two years, limitation would have barred a recovery.

10. The plaintiff was not entitled to money already collected by the city to pay the coupons. *Gould v. City of Paris*, 68 T. 511.

#### ART. 421. City bonds specify what.

All bonds shall specify for what purpose they were issued, and when any bonds are issued by the city, a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose; *providing, however*, that said sinking fund may, as it accumulates, be invested in bonds of the United States, the State of Texas, or counties in said state; and the city treasurer shall honor no draft upon said fund, except to pay interest upon or to redeem the bonds for which it was provided, or for investment in other securities as above provided. [Amendment April 3; July 6, 1889; 21 Leg. p. 2.]

## CH. 5.—TAXATION.

### ART.

425. *Ad valorem* tax. *Annotated.*

425a. School tax levied, when. *Annotated.*

425b to 425d. See Civil Statutes.

### ART.

426. Tax may be levied by city having over 10,000 inhabitants. *Amendment.*

427 to 437. See Civil Statutes.

### ART. 425. *Ad valorem* tax.

(1.) The Legislature never having conferred upon the city of Austin the power to exempt any property which it was authorized to tax, a contract with a private company exempting it from taxation in consideration of its establishing gas works and furnishing the city with gas at a reduced price in so far as it attempted to give the exception claimed, is void. [The State v. Railroad Company, 75 Missouri, 210; Primm v. City of Belleville, 59 Ill. 142; Boody v. Watson, 63 N. H. 320; Memphis Gas Company v. Shelby County, 109 U. S. 398; Noyzlett v. The City of Mount Vernon, 33 Tenn. 232; Weeks v. City of Milwaukee, 10 Wis. 206; Hallo v. Helmer, 12 Neb. 94; City of New Orleans v. Railroad Company, 28 La. Ann. 498; Cooley on Taxation, 153; Dillon on Municipal Corporations, 776; Desty on Taxation, 132, 466.]

The declarations of the constitution that "taxes shall be equal and uniform throughout the state," and that "all property in the state shall be taxed in proportion to its value," except as the Legislature was authorized, by a two-thirds vote of both houses, to change these rules by exempting property from taxation, controlled municipal as well as state taxation; and, in the absence of legislation clearly expressing an intention to authorize the city council of the city of Austin to exempt property from taxation, if it be conceded that the Legislature might have done this, it must be held that the assumption of such a power by the city council was not only an act *ultra vires*, but an act in violation of the substantial provisions referred to above. [The State v. Railroad Company, 75 Missouri, 211; Primm v. City of Belleville, 59 Ill. 142; Weeks v. City of Milwaukee, 10 Wis. 200; Cooley on Taxation, 251; Desty on Taxation, 481.]

It is urged that the contract in question did not give an exemption from taxation, but that by way of commutation the gas company paid and agreed to pay to the city, through the deductions to be made in favor of the city from the prices paid by other customers for gas, a sum equal to or greater each year than would be the taxes on the company's property, and that, therefore, the contract was not invalid. This proposition is unsound. The power to commute taxes, as said by the Supreme Court of Louisiana, is but an incident of the power to exempt; and, when the latter does not exist, the incidental power must be denied. [City of New Orleans v. Railroad Company, 28 La. Ann., 498; Manufacturing Company v. New Orleans, 31 La. Ann. 447.] The thing given or paid in commutation is but the price paid for exemption from liability to do some act or to pay some other sum. Austin v. Gas Company, 69 T. 180.

### ART. 425a. School tax, levied when.

(1.) After the city of Austin had assumed control of its public free schools, its voting inhabitants determined by vote that a tax of two mills on the dollar should be levied for the support of such schools. Afterwards, in 1883, a majority of the voters voted in favor of a proposition to levy "a special additional annual tax of one and one-third mills upon the dollar, upon all property made taxable by law in the city of Austin for public free school purposes within the limits of the city." The statute provided that when such an election is held, "the proposition submitted may be for a tax not exceeding one-half of one per cent. or it may be for a specific per cent." Held: That the proposition submitted at the election of 1883 was, within the spirit of the statute, a proposition to authorize the levy and collection of a specific per cent." Austin v. Gas Company, 69 T. 180.

ART. 426. Tax of two and one-half per cent. may be levied by city of more than 10,000 inhabitants.

(1.) Though the charter of a city in force when the present constitution was adopted, limited its taxing power to the collection of taxes not to exceed two per cent. *ad valorem*, the city may, without further legislative authority, levy and collect two and a half per cent. *ad valorem*, when the same may be necessary to pay

the interest and provide a sinking fund to satisfy indebtedness existing when the present constitution was adopted.

The subjects to which sections 5 and 6, of article 11, of the state constitution refer being different, the limitations found in section 5 do not apply to section 6, which declares the limitation that shall be applied to that which from the nature of the subject cannot be limited by a given per cent. *ad valorem* tax.

To give effect to sections 5 and 6, of article 11, of the constitution, the former must be held to regulate taxation to raise money for current expenses, and to meet further indebtedness, which, under the constitution may be created, and in no manner to operate as a limitation on the power of the taxation conferred by section 6, article 11, which relates to only such taxation as is necessary to raise means to pay municipal debts existing at the time the constitution was adopted. If it be necessary to levy a tax exceeding two and a half per cent. *ad valorem* in order to raise funds to pay debts of a city which were created before the constitution was adopted, the power exists under section 6, of article 11, of the constitution; and this, though the charter was granted before the adoption of the constitution, limited the power of the city to two per cent. per annum. This power must be exercised by the city whenever demanded by the holder of a claim entitled to be paid by such tax.

The power conferred on a city by section 6, article 11, of the constitution, is not a discretionary power, but was conferred to secure the rights of creditors, and must be exercised when necessary for their protection; if not to raise a *pro rata* to be distributed among many, equally meritorious, but a tax should be collected sufficient to pay all. To compel the exercise of this power, a complaining creditor is entitled to a writ of *mandamus* to compel the levy and collection of a sufficient tax to satisfy his debt. *Voorhies v. Mayor*, 70 T. 331.

#### **ART. 426. Tax may be levied by city having over 10,000 inhabitants.**

Cities having more than ten thousand inhabitants may levy, assess, and collect taxes not exceeding one and one-half per cent. on the assessed value of real and personal estate and property in the city, not exempt from taxation by the constitution and laws of the state, and assessments, levy, and collection of taxes made by such cities for the year 1889, are hereby made valid to the amount aforesaid, and such cities are hereby authorized to levy, assess, and collect a further tax of twenty-five cents on the one hundred dollars' worth of property, for the purpose of paying the debts of such city lawfully contracted prior to the first day of January, 1889, not to include any bonded debt. Any funding warrants that may be issued for such debt by any such city, shall not be included in the limit of six per cent. prescribed by article 420; *provided*, that this act shall not apply to or in any manner affect any city organized under a special charter, and shall not be construed to validate any debt contracted by any city without authority of law existing at the time the same was contracted. [Amendment April 8; July 6, 1889; 21 Leg. p. 3.]

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### **CH. 6.—COLLECTION OF TAXES.**

**ARTS. 438 to 452.** See Civil Statutes.

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### **CH. 7.—FIRE DEPARTMENT.**

**ARTS. 453 to 466.** See Civil Statutes.

## CH. 8.—SANITARY DEPARTMENT.

ARTS. 467 to 473. See Civil Statutes.

## CH. 9.—STREETS AND ALLEYS.

ART.

474. Power of city council to have streets, etc., graded. *Annotated.*

ART.

475 to 477. See Civil Statutes.

478. Condemnation of property for streets. *Amendment.*

### ART. 474. Power of city council to have streets graded.

(1.) When a city has a charter with defined powers, the law imposes the duty of faithfully exercising them; and it gives an action to any person injured by a negligent failure of such duty. *Galveston v. Posnainsky*, 52 T. 118.

By the charter of the city of Dallas, the city was given control of its streets, sidewalks, sewers, etc. Its ordinances recognized Pacific avenue as a street. A sidewalk, about six feet wide, on this street is separated from the street by a ditch from three and a half to four feet deep, with perpendicular bank next the sidewalk. On a night in December, about eight or nine o'clock, plaintiff, passing along the sidewalk in the dark, fell into the ditch and broke his leg. In suit for damages, *held*:

1. Error to instruct the jury to return a verdict for defendant, unless they found from the testimony that the defendant had constructed the sidewalk and ditch.

2. If the sidewalks, by whomsoever constructed, became dangerous to the traveling public, the corporation was bound to repair them.

3. A neglect to repair, after notice of the defect, would be a cause of liability in favor of one injured thereby.

4. By notice is meant actual or constructive. The latter exists if the corporation, by the exercise of ordinary diligence, could have discovered the defect in time to have made the necessary repairs before the injury, and is inferred by the circumstances by the jury.

If a city constructs a sidewalk, in which are visible defects, no further notice is needed.

The mere existence of a dangerous sidewalk would not raise the presumption that it was known to the city authorities. The city would not be liable for the act of a wrongdoer rendering the street or sidewalk dangerous, until notice be brought home to the city authorities of such condition. *Klein v. City of Dallas*, 71 T. 280.

### ART. 478. Condemnation of property for streets, etc.

#### §1. CONDEMNATION AUTHORIZED; PROCEEDINGS THEREFOR.

Whenever the city council of any incorporated city or town shall deem it necessary to take any private property, in order to open, change, or widen any public street, avenue, or alley, or for the construction of water mains, or supply reservoirs or stand-pipes for water works, or sewers, within or without the limits of such city or town, such property may be taken for such purpose by making just compensation to the owner thereof. If the amount of such compensation cannot be agreed upon, it shall be the duty of such city council to cause to be stated in writing the real estate or property sought to be taken, the name of the owner thereof, and his residence, if known, and file such statement with the county judge of the county in which said property is situated. Any company or corporation chartered under the laws of this state for the pur-



pose of constructing water works or furnishing water supply for any town or city, shall have the same right to condemn property necessary for the construction of supply reservoirs or stand-pipes for water works, when deemed necessary to preserve the public health, that is given towns and cities under this act.

§2. **ASSESSMENT OF DAMAGES.** Upon the filing of such statement, it shall be the duty of said judge, in term time or vacation, to appoint three disinterested freeholders and qualified voters of the county as special commissioners to assess the damage to accrue to the owner by reason of such condemnation.

§3. **MODE OF PROCEEDING; MEASURE OF DAMAGES; APPEAL, ETC.** The commissioners so appointed shall, in their proceedings, be governed and controlled by the law in force in reference to the condemnation of the right-of-way for railroad companies, and the assessment of damages therefor—the city, town, company, or corporation occupying the position of the railroad company. And all laws in reference to applications for the condemnation for right-of-way of railroad companies, including the measure of damages, the right of appeal, and the like, shall apply to an application by a city or town, company or corporation, under this act, for the condemnation of property for the purpose of opening, changing, or widening streets, avenues, or alleys, or for the construction of water mains, sewers, supply reservoirs, or stand-pipes—the city, town, company, or corporation to occupy the position of the railroad company.

§4. **ARTICLE 478 REPEALED.** Article 478 of the Revised Statutes be, and the same is hereby, repealed. [Amendment §4; April 8; July 6, 1889; 21 Leg. p. 3.]

See, *post*, next to last paragraph of note 11, to article 551.

## CH. 10.—MISCELLANEOUS PROVISIONS.

**ART.**  
479 to 485. See Civil Statutes.  
486. Ordinances shall be published.  
*Amendment.*  
487 to 503. See Civil Statutes.

**ART.**  
503a. Adjoining territory withdrawn  
from city limits. *Annotated.*  
503b to 505. See Civil Statutes.

**ART. 486. Ordinances shall be published.** Every ordinance imposing any penalty, fine, imprisonment, or forfeiture shall, after the passage thereof, be published in every issue of the official paper for ten days; if the official paper be published weekly, the publication shall be made in one issue thereof; and proof of such

publication shall be made by the printer or publisher of such paper, making affidavit before some officer authorized by law to administer oaths, and filed with the secretary of the city or town, and shall be *prima facie* evidence of such publication and promulgation of such ordinances in all courts of the state, and such ordinances so published shall take effect and be in force from and after the publication thereof, unless otherwise expressly provided. Ordinances not required to be published shall take effect and be in force from and after the passage, unless otherwise provided. If any town or city shall desire to publish its ordinances in pamphlet or book form, it shall not be necessary to republish such ordinances as have been previously published. [Amendment February 23, 1889; 21 Leg. p. 4.]

ART. 503a. Adjoining territory withdrawn from city limits.

(1.) When the official act which an officer may perform involves the exercise of his judgment, his decision is not subject to revision by *mandamus*.

In determining upon the sufficiency of an application of persons applying to the mayor of an incorporated city under this article to order an election to restrict the limits of said city to an area embracing a diameter of one mile, the mayor must, before ordering the election, determine two facts: First, that there is a surplus of territory over the limits prescribed by the statute; and, second, that at least fifty qualified voters of that territory have signed the petition. If there be controversy as to the existence of these facts, his act in determining it is one of judgment or discretion, and if he refuses the application he cannot be compelled to order the election.

If, under such circumstances, a writ of *mandamus* be applied for, to compel the mayor to order an election, and the petition states facts which, if true, would, under the statute, require him to do so, a general demurrer to the petition relieves the case of controversy by admitting the truth of the allegation, and since, in the absence of an answer to the merits, the act has thus become one purely ministerial, a peremptory *mandamus* should issue to compel his obedience to law. [Arberry v. Beavers, 6 T. 457; The State v. The Commissioners, etc., 8 Nevada, 309; Gibbs v. Bartlett, 63 California, 117, reviewed.]

The act of April 14, 1883 (arts. 503 a, b), which provides the manner in which the territorial limits of an incorporated city may be diminished, is not invalid because of its failure to prescribe a method for holding elections; being made a part of title seventeen, of the Revised Statutes, the intention must be presumed that elections ordered under it should be held as other elections.

If the signers to a petition to restrict under the statute the area of territory included in the limits of an incorporated city, are qualified voters in the territory sought to be excluded, they, as such, being at least subject to the payment of a poll-tax, have such an interest as will entitle them to maintain a suit by *mandamus* to compel the performance of an act which is purely ministerial in ordering the election to restrict the city limits. On this point this case distinguished from Turner v. The Commissioners, 10 Kansas, 16, and Bobbett v. The State, 11 *Id.*

When it is apparent that the refusal of an officer to perform an official act, which *prima facie* involves judgment and discretion in regard to the existence or non-existence of the conditions which would require its performance, is arbitrary, and not because of any doubt or conviction regarding his duty, and there is no controversy as to the existence of the facts which would make his action purely ministerial, *mandamus* will lie. Under such circumstances a special answer, which controverts no allegation in the petition, and which rests the defense on the fact that the mayor had rejected the application for an election "upon full consideration, and upon advice of counsel," should be treated as a nullity, even in the absence of a demurrer thereto.

The rules of pleading at common law, in cases of *mandamus*, should be observed when not in conflict with the statutes. The respondent was at common

law required in his answer to plead specially by distinct traverse of the allegations of the writ, or by way of confession and avoidance. It follows that a general demurrer to the petition should be disregarded. When the allegations of the petition are sufficient to entitle the plaintiff to the writ, and the pleadings of respondent present no issue of fact, judgment should be rendered against the respondent and direct the issue of the peremptory writ. *Sansom v. Mercer*, 68 T. 488.

## CH. 11.—TOWNS AND VILLAGES.

### ART.

506. See Civil Statutes.

507. Manner of incorporating. *Amendment.*

508. County judge to order election to determine. *Annotated.*

### ART.

509 to 518. See Civil Statutes.

519. Annual election of officers. *Annotated.*

520 to 541f. See Civil Statutes.

### ART. 507. Manner of incorporating.

If the inhabitants of such town or village desire to be so incorporated, at least twenty residents thereof, who would be qualified voters under the provisions of this chapter, shall file an application for that purpose in the office of the judge of the county court of the county in which the town or village is situated, stating the boundaries of the proposed town or village and the name by which it is to be known if it be corporated; *provided*, that if any town or village be situated on both sides of a line dividing two counties, application may be made to the judge of the county court of either county in which a portion of said town or village is located, in manner and form as is hereinbefore provided; *provided further*, that in towns and villages that may be incorporated on territory in two counties, in the trial of offenses before the mayor or recorder for a violation of the laws of the state or the ordinances of the corporation, an appeal shall be to the county court of the county in which the offense may have been committed; and in cases in which said mayor or recorder have not final jurisdiction, but when sitting as an examining court, parties brought before them on such examining court, charged with an offense against the laws of the state, shall be bound over by them to the county court of the county in which said offense is alleged to have been committed, or to the district court, as the case may be. [Amendment February 13, 1889; 21 Leg. p. 5.]

### ART. 508. County judge to order an election to determine, etc.

(1.) The findings of a county judge, that the territory sought to be embraced within a contemplated municipal corporation has the population required by statute, is conclusive, since the law provides no means whereby his findings may be revised. *The State v. Goowin*, 69 T. 55.

(2.) An inquiry may be made, by *quo warranto*, into the legality of a corporation, when the right of a person claiming to be an officer under the terms of its charter, to exercise such powers as the charter proposes to give, is called in question. *The State v. Goowin*, 69 T. 55.

### ART. 519. Annual election of officers.

(1.) When an election has been held for officers of a municipal government, at the time prescribed by the statute, at which election the will of the voters has

been fairly expressed, and which was preceded by every legal step necessary to a valid election, except that the election was ordered by *de facto* officers, exercising the powers of mayor and aldermen, such election must be deemed valid. The State v. Goowin, 69 T. 55.

A municipal corporation is not dissolved by the failure to elect officers. The State v. Dunson, 71 T. 65.

(2.) The Legislature may make the question, whether a corporation has been created or not, depend on the action and determination of some official or tribunal whose determination the courts will have no power to revise, and if this be done, in a proceeding by *quo warranto* against persons who assume to exercise the powers given by the act of incorporation, no inquiry could be made into the legality of the corporation. The State v. Goowin, 69 T. 55.

## CH. 12.—UNINCORPORATED TOWNS AND VILLAGES.

### ART. 541g.

§1. Boundary of unincorporated town or village laid off, how. *New.*

§2. Board of health appointed, how. *New.*

### ART.

§3. Duty of board of health. *New.*

§4. Penalty for not complying with order of board of health. *New.*

### ART. 541g, §1. Boundary of unincorporated town or village laid off, how.

The commissioners' court of any county in which an unincorporated town or village may be situated be empowered to lay off the lines embracing said town or village.

### §2. Board of health appointed, how.

The commissioners' courts of the county in which any such town or village may be situated, may appoint a board of health for said town, consisting of three persons, not less than two of whom shall be regular practicing physicians, and shall at once notify the state health officer, and said board so appointed shall be subject to the state health officers.

### §3. Duty of board of health.

After the result of the appointment of said board, they must elect one of their number as presiding officer, whose duty it shall be to notify any citizen residing within the prescribed limits of the said town or village whenever his premises are in an unclean and unhealthy condition, and that he must proceed at once to clean his premises.

### §4. Penalty for not complying with order of board of health.

Any person living within the prescribed limits of such town or village, having received such notice and failing to comply, shall be deemed guilty of a misdemeanor and punished in any court of the state having jurisdiction, and fined not less than five (5) nor more than ten (10) dollars, together with all cost attached to the case, for each and every offense. [Act April 5; July 6, 1889; 21 Leg. p. 139.]

## TITLE 18.—COMMISSIONER OF DEEDS.

ARTS. 542 to 547. See Civil Statutes.

## TITLE 19.—CONVEYANCES.

### ART.

548. Conveyances must be in writing, etc. *Annotated.*

548a to 550. See Civil Statutes.

551. Estate deemed a fee simple if not limited. *Annotated.*

552. See Civil Statutes.

553. Other forms and clauses valid. *Annotated.*

### ART.

554. Deed must be witnessed or acknowledged. *Annotated.*

555 to 558. See Civil Statutes.

559. Conveyance of separate lands of wife, how made. *Annotated.*

560. Conveyance of homestead, how made. *Annotated.*

561. Defective conveyance valid as a contract. *Annotated.*

### ART. 548. Conveyances must be in writing, etc.

(4.) One who claims under a quit-claim deed which on its face purports to convey only the interest of the vendor in the land as contradistinguished from a conveyance of the land itself, cannot be an innocent purchaser.

In this case a deed, reciting that for and in consideration of preventing a suit and the payment of ten dollars we "bargain, sell, remise, release and quit-claim all our right, title, interest, estate, claim and demand in and to" the land in controversy, was held to be a quit-claim deed. *Lumber Co. v. Hancock*, 70 T. 312.

One who has purchased the absolute right to land, in contradistinction to that of the title or claim of title of the grantor, and who, by evidence aside from the recitals of his deed, shows that he has paid a valuable consideration therefor, may claim as an innocent purchaser against any adverse title or equities of which he had no notice. The doctrine that a grantee under a quit-claim deed is not to be treated as an innocent purchaser, applies only to quit-claim deeds in the strict sense of that species of conveyances, or, in other words, such deeds as purport to convey and quit-claim to the purchaser no more than the right, title or interest of the grantor. [*Harrison v. Boring*, 44 T. 256.]

When the instrument in which a clause of warranty is contained purports to make a full and perfect conveyance of land described in it, this clause does not strengthen or enlarge the title conveyed, but only evidences a separate contract, by which the grantor agrees to pay damages if the title fails.

If a grantor conveys no more than his title, the presumption is that he had doubts as to his right to the land, and notice of some opposing claim, and he thus suggests that doubt on the face of his deed. If he conveys the land without restriction as to title, it will be presumed that he had and intended to convey as full a title as could be held in the land, and that he had no doubt of his right to do so.

In such case the purchaser has notice, from an inspection of his deed, that he is getting such title as the grantor purports to convey—in the one case a doubtful title, and he is put upon inquiry as to the claim which casts the doubt upon it,—in the other a full title, and he need make no inquiry on the subject.

In America the words "grant, bargain and sell" may convey full fee simple title to any species of property. A release may be used to convey a title to one who has no previous right in the land, and is, in most states, equivalent to the words "quit-claim."

The granting clause in a deed was as follows: "For the sum of two hundred dollars, received to my full satisfaction of John C. Moody, of Victoria county, in the State of Texas, do by these presents grant, bargain, sell, demise, release, and

forever quit-claim unto the said Moody, his heirs and assigns, the following lot of land, situate," etc. *Held*:

1. That the use of the word "quit-claim" in the deed did not make it any the less a conveyance of the lot described, or restrict it so as to make it upon its face convey no more than the interest of the grantor in the property.

2. One holding under such a deed, having paid the purchase money, may be a *bona fide* purchaser, and, as such, protected against a prior unregistered deed, of which he had no notice. *Richardson et al. v. Levi et al.*, 67 T. 359.

See, *post*, Art. 4332 and notes.

(5.) Where the description in the deed given of the property to be conveyed is general in the granting clause, and is immediately followed in the same clause by an exception, which points out the particular property which is to be excluded from the grant, there is no repugnancy, for the exception is not out of the thing previously granted, but is incorporated in the very substance of the granting clause.

When one purchased land, described in the deed in general terms as in the northeast corner of a larger tract, but also described by lines actually run by the surveyor, and marked upon the ground, the actual survey must determine the locality of the land, and will control the general call for the unascertained corner of the larger tract. *Koenigheim v. Miles et al.*, 67 T. 113.

When one who entered under a deed for a less quantity of land than six hundred and forty acres, continues his possession until title is secured under the ten years' statute of limitations, the admission of the deed in evidence, which on its face is ambiguous as to the bounds of the land intended to be conveyed, becomes unimportant. *Branch v. Baker*, 70 T. 190.

In an action for specific performance of a contract for the sale of land, the vendee was permitted to show the representations of the vendor as to the boundaries of the land, and to have the contract reformed and enforced, so as to conform to such representations. *Goff v. Jones*, 70 T. 572.

The purchaser of a brick business house and the lot on which it is situated, and who is in no way at fault in the matter, may have the sale rescinded on discovering a valuable portion of the improvements to be in the street, the possession of the street not having continued long enough to confer title by limitation. *Rip-petoe v. Low*, 1 U. C. 475.

Description of land in a deed locating it in such manner, that running one line will designate it and set it apart, and there is only one part of the survey where it could be so designated, is sufficient. *Fletcher v. Ellison*, 1 U. C. 661.

A deed conveying many tracts of land attempted to convey land by the following description: "Three hundred and twenty-four acres, Milton Sweeney tract, in Polk county, valued at one hundred and seventy-one dollars," *held*, that the description considered in connection with other deeds in the line of the claimant's title, which described more specifically the survey, sufficiently identified the land. *Parrish v. Jackson*, 69 T. 614.

A deed conveying a town lot which describes it only by the length and breadth thereof, but which, in addition, designates the particular property by describing the improvements thereon, they being the only improvements of like character in the town, is sufficient. *Harkey v. Cain*, 69 T. 146.

Where land in a deed is described by number of acres, grant and county, and the grantor owned, at the date of his grant, that or a less number of acres, the deed will convey the land, such facts being shown. When a larger number of acres is owned than that granted, the grantee becomes by the deed a co-owner or tenant in common with right of selection or partition. [46 T. 335; 23 T. 36; *id.* 136; 48 T. 379; 46 T. 99; 50 T. 369; 51 T. 614; 52 T. 246; 25 T. 519; 29 T. 201; 18 T. 116; 14 T. 270.] *Blackburn v. McDonald*, 1 U. C. 355.

The land was described as 200 acres part of a designated league to be run off fronting 475 varas on the W. river and back for complement, field-notes to be attached to the deed as a part thereof. *Held*, that the description was sufficiently certain, and the deed was not impaired as a recorded instrument by reason of the field-notes not being attached. *Nye v. Moody*, 70 T. 434.

(7.) A deed should be so construed if possible as to give it effect, and a defective description may be aided by reference to such other portions of the deed as make clear the specific property intended to be conveyed. If the deed refers to another instrument for further description, it is competent to resort to it to ascertain the location and description of the property sold.

When the deed from A. H. to G. R. Sims was offered in evidence, the appellant objected to its being received because of a variance between the description of the lot in the deed and that contained in the petition, which objection was overruled. In this there was no error. Whilst the lot was called lot "A" in the petition, and lot "7" in the deed, it was perfectly competent to show, by the language of the deed itself, that by lot "7" the lot described in the petition was intended. This was shown by the agreement referred to in the deed. That agreement showed that lot "A" had taken the place of lot "7" and belonged to A. H. & G. R. Sims, and that after the agreement was made there was really no lot seven in block eighteen, A. H. & G. R. Sims owned no lot in the block except lot "A" at the time the deed from one to the other was executed. Hence this deed would convey nothing, and would be wholly inoperative if we limited the description of the land conveyed to lot seven in block eighteen. But under accepted maxims of the law we must construe the deed, if possible, so that it may have effect, especially if, from other portions of it, the lot intended to be conveyed is clearly indicated. [Broom's Legal Maxims, 490 *et seq.*] The instrument, in referring to the agreement for a subdivision of block eighteen, made between A. H. & G. R. Sims and others, adopts the description as then given of the lot which fell to the share of the Sims brothers under that agreement, and conveys that lot. By reference to the agreement it will be seen that this lot is lot "A" in the new subdivision, and construing the deed to convey that lot it is made operative, and the intention of the parties to the instrument is carried out. It is apparent that lot "A" was intended to be conveyed, and there was no variance between the deed and the petition. Both parties to this suit claimed title through Holcomb and wife, and it was sufficient for the appellee to trace back his title to this common source. *Cleveland v. Sims*, 69 T. 153.

There is no analogy between the relinquishment of title under the colonization laws of Mexico by a settler and the abandonment of title vested by patent from the state. Under the laws of Spain and Mexico, as they existed in 1834, the owner of land lost his title to it when he ceased to occupy it with the intention of relinquishing his claim to it. [Landes v. Perkins, 12 Mo. 256; and *Clark v. Hammerle*, 36 Mo. 639, followed.]

A settler under the colonial laws of Mexico, who had already received a grant of land, in his application for other land, after stating that his grant was issued without authority, and praying for another, used this language: "Saving my right to claim that which was given to me by mistake." *Held*:

1. He was not, under the laws in force, entitled to two grants.
2. The intention to relinquish the first grant, in the event title to land last applied for was extended, is manifest, and, on receiving title to the land last applied for, title to the first grant was extinguished.
3. Even at common law the settler would, under the facts stated, have been estopped from asserting title as against a subsequent grantee from the government of the land thus relinquished, who obtained his title through the same officer who extended the second title and passed on the relinquishment of the first. *Sideck et al. v. Duran et al.*, 67 T. 266.

(13.) To complete that delivery of a deed which is necessary to pass title to land, it must be placed by the grantor in the control of the grantee, with the intent that it shall become operative as a conveyance. *Steffian v. Bank*, 69 T. 513.

It is error to charge that a parol trust can only be engrafted on a deed absolute by the clearest and most positive proof. Evidence that satisfies a jury of the existence of the parol trust is sufficient. *Neyland v. Bendy*, 69 T. 711.

A trustee will not be heard to assert title in himself adverse to that of the *cestui que trust*, or to deny his title. In a suit by the *cestui que trust* to compel a reconveyance of land in accordance with the terms of the trust, the trustee cannot defend by showing a superior outstanding title. *Neyland v. Bendy*, 69 T. 711.

A trustee acting under a power to sell, who conveys the trust property to himself, thereby constitutes himself by his own fraud a constructive trustee, and he and all who purchase from him with notice, will be regarded in equity as holding the property in trust for the original beneficiary.

Circumstances which might validate such a sale will not be presumed, but must be proved by the purchaser, and in a suit to recover property thus conveyed by several trustees to one of their own number, and afterwards conveyed by him to a third party, when the trustee and his vendee are both made defendants, it is not necessary to allege that the vendee knew of the decree which created the trust, or that he knew that the trustees had sold the property to one of their

number. These facts were in the line of the vendee's title, and it was sufficient to allege the title under which the vendee claimed. It was equivalent to charging him with knowledge of the fraud which constituted his vendor a constructive trustee.

See the opinion in this case for a statement of the allegations in a petition by one of many parties in interest, the others not joining, to recover her interest in a trust estate, purchased by the defendant from one constituted a constructive trustee by his own fraud in conveying the trust property to himself, held good on general demurrer. *Everett v. Henry et al.*, 67 T. 402.

A trustee appointed under decree to sell land, who conveys the title for the nominal consideration of one dollar, violates the trust, and the deed executed by him amounts only to a deed of gift. The donee in such case becomes a trustee for the beneficiaries in the trust, and this, whether the donee had notice of the trust or not, since he had not paid value for the land. *Everett v. Railway Co.*, 67 T. 430.

(14.) The material used in the construction of a railway on the land of another without right acquired from the land owner to place it on his land does not become such a fixture as to constitute it the property of the owner of the land. *Preston et al. v. Railway*, 70 T. 375.

(15.) A deed executed under a power of attorney was offered in evidence.

An inspection of the power of attorney shows that in Union county, Arkansas, May 30th, 1859, "John Q. Adams, W. R. Adams, Alabama Smith and Wm. M. Smith, her husband, M. E. Hill, and George W. Hammond as guardian for George W. Adams" (minor heir of George W. Adams, deceased), styled "heirs of the estate of B. F. Adams, deceased, of Robertson county, Texas," empowered Bartlett W. Brown to take possession, lease, sell, etc., all lands of the estate of Ben. F. Adams, deceased, of Robertson county, Texas. The document is signed by "G. W. Hammond," and the others named in the body of the instrument, and was acknowledged in Arkansas before a justice of the peace.

It is not shown upon what objection the document was excluded. It does not appear to have been proven; it was not properly acknowledged for record. "George W. Hammond," who purported, in the body of the instrument, to act for "George W. Adams, a minor," could not sell the minor's property, and, of course, could empower no one else to do so. There is no evidence of any benefit accruing to the minor from the labor of Brown, or any act of recognition of his acts. There was no error in the exclusion of the power of attorney by Hammond and others when offered as against the plaintiff, who was, as is claimed by the minor, represented by Hammond. *Mitchell v. Adams*, 1 U. C. 117.

#### ART. 551. Estate deemed a fee simple if not limited.

(2.) In 1854 certain citizens of the city of Bonham and Fannin county, together with Masonic Lodge No. 13, established, by the subscription of money and property in sums from \$25 to \$1,000, an institution of learning, intended for the instruction of females alone, where no sectarian religious doctrines of any kind should be taught.—the lodge, by agreement of all parties, being selected as trustee,—and on January 24th, 1856, Bailey English donated ground on which to erect the necessary school buildings, conveying the land to the lodge \* \* \* "to have and to hold the said four acres of ground unto the said Constantine Lodge in trust for the stockholders of the Bonham Masonic Female Institute." In 1868 the lodge sold and attempted to convey the land away; the purchaser took possession, opened a mixed male and female school, and undertook to make it a Campbellite institution. In a suit by a number of the subscribers to have the property restored to the use originally intended, *held*:

1. The petition showing the suit was to enforce a trust for charitable uses, and prevent the perversion of the trust property to improper uses, disclosed a good cause of action.

2. Evidence was admissible to show that by "stockholders," in the deed to the land, was meant subscribers to the institution; and

3. That an election of trustees in accordance with the act of January 30th, 1845, authorizing the appointment of trustees in certain cases, was not necessary to complete the organization of the institution, or essential to its existence. [*Dana v. Fielder*, 12 N. Y. 40; 1 Greenl. Ev., sec. 288; *Wharton*, 939; *Thomas v. Ellmaker*, Select Cases in Equity, 110; *Paschal v. Acklin*, 27 T. 200.] *Carleton v. Roberts*, 1 U. C. 587.

(11.) A deed containing no words of defeasance, conveying land in trust for the benefit of designated parties, which contains no direction as to how the prop-



erty is to be made available, but which is made for the sole use and benefit of parties named therein in proportion to the debts specified as being due to each from the grantor, conveys the absolute title, to be disposed of by the trustee as the beneficiaries may direct or approve, and this without the aid of a court of equity. *Catlett et al. v. Starr*, 70 T. 485.

To control the evidence of a deed and establish a resulting trust in land by parol, from the payment of the purchase money, the trust must be proved with great clearness and certainty by evidence full, positive and satisfactory; if the testimony is conflicting, it lacks the precision which the law in such cases requires.

No agreement by parol, subsequent to the purchase, will create a trust in land. The trust results, if at all, the instant the deed is taken, and the legal title vests in the vendee. *Cunio v. Burland*, 1 U. C. 469.

An owner of land adjoining the right-of-way of a railway company as an incident of such ownership has the right to grant the right-of-way to a street car railway company over and across such land to the railroad, subject, however, to the rights of the public to condemn and establish a public way. Such condemnation and appropriation, however, must be done under the law and upon compensation. The same rule would obtain if the railway company owning the track also owned the land adjoining the right-of-way.

Until such appropriation, in a legal way, to the public use, has been made, a right-of-way to one person or corporation across such land is entitled to protection. [*Ante*, Art. 478.]

An injunction would properly issue restraining a rival street railway company from interfering with a right as in above stated facts. *Railway v. Railway*, 71 T. 161.

#### ART. 553. Other forms and clauses valid.

(1.) One who accepts a deed with full knowledge of an incumbrance or adverse claim which may affect his interest in the property purchased, cannot set up a breach of warranty until the adverse claim is established. *Railway v. Gentry*, 69 T. 625.

(8.) A covenant of warranty in a deed of partition between an owner and one having no interest is not available to the latter. A contract of warranty must have a consideration to support it. *Davis et al. v. Agnew*, 67 T. 206.

(11.) The covenant of general warranty provided for in article 552, *ante*, binds the grantor to "warrant and forever defend" the title to the grantee, "his heirs and assigns." This obligation is continuous and is a covenant running with the land, which accompanies all conveyances of the same, and passes to each successive purchaser.

One effect of such a covenant is to pass, without the need of another conveyance, any title to the same land subsequently acquired from another source by the covenantor himself. The covenant of warranty adds nothing to the deed by way of operating a conveyance of the existing right which is vested at the time in the grantor, and which is conveyed by other clauses in the deed.

[*Beddoes, Executor, v. Wadsworth*, 21 Wendell, 120; *Brady v. Spurek*, 27 Illinois, 478; *McCrary v. Brisbane*, 1 Nott & McCord, 104; *Lewis v. Cook*, 13 Iredell, 196, and *Town v. Needham*, 3 Paige, 546, approved.] *Flaniken et al. v. Neal et al.*, 67 T. 629.

When land is sold and accurately described in a warranty deed by metes and bounds, which embrace the number of acres purchased, and it is found that a portion of land described is embraced within the limits of an older and superior grant, the result is a partial breach of the warranty, and the purchaser is entitled to have an outstanding negotiable promissory note given for purchase money canceled, and to have such part of the purchase money paid returned, as would be equal to the excess paid over the value of the land to which appellee took title through the conveyance. This rule announced as applicable to cases where the deficiency was not known when the conveyance was made.

In such a case it is not necessary that the purchaser should offer to surrender the deed and to deliver possession of the land before he can have relief; he may retain so much of the land as his deed entitles him to, and enforce reclamation if he has overpaid, to the extent pro rata of the land to which title has failed.

Nor is it necessary that he should show in whom the superior title to the conflict vested when the purchase was made. It is enough to show that superior titles had issued for the amount of the deficiency before the sale, which *prima facie* would be regarded as outstanding as against the vendor at the time and since the execution of the deed by him. *Doyle v. Hord*, 67 T. 621.

(12.) When land is purchased under mutual mistake on the part of the vendor and vendee, as to the locality of adjoining surveys called for in a deed, the true position of which limits and diminishes the area of the land, so that title to the full tract bargained for does not pass by the deed, equity will afford no relief to the purchaser, and it is immaterial that the conveyance was with special warranty. *Moore et al. v. Hazelwood*, 67 T. 624.

One who purchases, pays a valuable consideration, and receives a deed from another who is in possession of land, under a deed which by mistake conveyed a larger quantity of land than was intended by the parties to the conveyance, is protected against the remote vendor in a suit brought to correct the mistake, if he had no notice at the time of his purchase, and there was nothing on the face of the deed to suggest inquiry regarding a mistake. *Garrison v. Crowell et al.*, 67 T. 626.

(14.) It is insisted that if the parties to an agreement for the sale of land were mutually mistaken as to the quantity of the land, defendant is entitled to claim no abatement of the purchase money. The authorities are not in accord upon this question; but the decisions of this court recognize that save in a case where the land is sold in gross and the quantity stated in the conveyance is qualified by the words "more or less," the purchaser will be relieved in equity, if the deficiency be great. The disparity being gross between the quantity believed by both parties to exist, and that which is found actually to exist, and both having been mutually mistaken, and the quantity being a material element of inducement in the sale, it is but equitable to let the purchaser retain his bargain and to relieve him from payment for that which he does not get. [*O'Connell v. Duke*, 29 T. 299; *Smith v. Fly*, 24 T. 345; *Walling v. Kennard*, 10 T. 508; *Mitchell v. Zimmerman*, 4 T. 75.]

It is said by an English author: "The purchaser's right is strictly to compensation and not necessarily to an abatement of purchase money proportionate to the surface deficiency; thus where, upon the sale of woodlands, the value of the timber was correctly stated, but the land was represented to contain more by twenty-six acres than the actual quantity, he was allowed as compensation the estimated value of twenty-six acres, minus the wood." [Dart on Vendors, 308; *Hill v. Buckley*, 17 Ves. 394.] *Wheeler v. Boyd*, 69 T. 293.

A purchaser of land taking a quit-claim deed, or deed with special warranty, and executing his note therefor, in absence of fraud, the maker understanding the facts, cannot defend against suit upon the purchase money note by showing that the vendor had no title to the land, and that no title passed.

The purchase money notes and the deed, executed together, in absence of fraud or mistake, express the conditions of the purchase and determine the rights of the parties. *McIntyre v. DeLong*, 71 T. 86.

"It cannot be questioned that it is competent for a purchaser of land, who has received a deed with special warranty, to show that a fraud has been practiced upon him in respect to the title. If a vendor of land has a perfect title in himself, his vendee may well be content to accept from him a deed with special warranty, because such a deed would in that case vest an unimpeachable title in the vendee. Originally, when a vendee accepts a quit-claim deed, or a deed with special warranty, the presumption of law is that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title. But where in the negotiations preliminary to the execution of the contract the purchaser stipulates for a perfect title, and is afterwards induced, by the false or fraudulent representations of the vendor, to accept a quit-claim deed or a deed with special warranty, in the belief that he is acquiring a perfect title, and one free from litigation at the time, he will be permitted to show that he was deceived in respect to the title, and may be relieved against such contract." [Citing 4 T. 75; 9 T. 85; 14 T. 629; 22 T. 429.] *Rhode v. Allen*, 27 T. 445.

#### ART. 554. Deed must be witnessed or acknowledged.

(3.) The husband who was a subscribing witness to a deed made to his wife during the marriage, and who at the time of its execution was not, under the statute, a competent witness to establish it, cannot as such subscribing witness prove it up for registration. Presumably the property, if acquired, was community, and the deed, in contemplation of law, was a conveyance to the husband. *Hardin v. Sparks et al.*, 70 T. 429.

A sale of land by an attorney acting under power "to take possession of and to grant, sell and convey the same," is not rendered invalid by a sale made in ac-

cordance with the terms of the power in other respects, but which is made in absence of actual possession being taken of the land by the attorney.

A deed executed by such attorney in consummation of such a sale is not invalidated by the insertion of a clause of warranty which is not authorized by the power of attorney. The warranty only would be invalid, but the deed would pass the title of the principal. *Barnard v. Blum*, 69 T. 608.

**ART. 559. Conveyance of separate lands of wife, how made.**

(1.) The interest of a married woman in land inherited from a deceased parent as part of such parent's community estate, is not divested by showing that such married woman, acting alone in her own right, independent of her husband, received from the surviving parent a sum of money, in payment for her interest, and executed a transfer and release of such interest to the surviving parent—as part of her separate estate—such interest could only be conveyed by the joint deed of the husband and wife, accompanied with a certificate of the privy acknowledgment of the wife.

Equity in seeking to uphold a family settlement consummated in the absence of fraud between the parties in interest, will not enforce it against one laboring under a statutory disability to make such settlement. When the statute prohibits the consummation of the settlement in the manner attempted, equity cannot affect it.

If, however, a married woman, who, in a family settlement, acting alone and for herself, receives a consideration for land inherited by her as part of the community estate of her mother, and makes a deed thereto to her surviving father, in which she is not joined by her husband, though she cannot thus divest herself of title, and may recover the land, she can only do so by accounting to those who have become entitled to the deceased father's interest for the money she received in settlement with him. *Stephens v. Shaw*, 68 T. 261.

A parol partition of land among joint-tenants, some of whom are married women, is not within the statute and is valid. *Aycock v. Kimbrough*, 71 T. 330.

(2.) The mere fact that the husband imposed upon his wife, and by misrepresentations induced her to sign a deed, coupled with the fact (if it existed) that the notary did not comply with the law in taking her acknowledgment, could not affect the rights of the vendees, they being ignorant of the facts.

The precedent debt of the husband to the grantees was a valuable consideration between the parties, and no additional consideration need be shown to have passed to the wife to give validity to the deed.

When the consideration of a deed by a married woman is so grossly inadequate and unreasonable as to excite suspicion of unfairness and undue influence, or of want of willingness to execute the same, the purchaser would be put upon inquiry as to the truth of the certificate of her privy examination and acknowledgment, and that in such case she could show its falsity. *Webb v. Burney*, 70 T. 322.

(4.) The doctrine held in *Patton v. King*, 26 T. 686, to the effect that a married woman may jointly with her husband make a valid conveyance of her separate property by an attorney in fact, duly authorized by power of attorney executed and acknowledged in the manner prescribed by law for the execution and acknowledgment of deeds of conveyance, reaffirmed.

There is nothing in the constitution or laws which would invalidate a conveyance of the homestead under such a power of attorney. *Warren v. Jones*, 69 T. 462.

The wife, by power of attorney to the husband, cannot confer upon him power to convey her separate property. *Peak v. Brinson*, 71 T. 310.

A deed to land which is not homestead, when signed by the husband and wife, if not properly acknowledged by the wife, is admissible in evidence in a suit against them to pass the community interest of both, and such separate estate as the husband have. If the wife has also a separate interest in the land, it is the duty of the court to limit the effect of the introduction of the deed in the charge to the jury.

(5.) If a deed from a married woman be procured by fraud in the purchaser, the fact that the deed contained recitals that the vendor "had employed able counsel, that the deed was made without solicitation from the vendee, and with a full knowledge of the vendor's rights," will not estop such married woman from showing that the purchaser who occupied as between the parties the position of a trustee had fraudulently concealed the value of the property. *Hickman v. Stewart*, 69 T. 255.

The deed of a married woman to her husband, not executed in conformity with the statute regulating the manner in which married women shall dispose of their separate estates, is a nullity. [*Berry v. Donley*, 26 T. 747.] *McDonna v. Wells*, 1 U. C. 35.

**ART. 560. Conveyance of homestead, how made.**

(3.) One who has ceased to be a citizen of Texas cannot claim a homestead or homestead rights in this state. [19 T. 275; 8 T. 312.] *Burcham v. Gann*, 1 U. C. 333.

A husband and wife owned land in Texas and lived upon it as a homestead. The wife becoming dissatisfied they went to another state. Afterwards the husband returned to Texas and sold the land, the wife not joining in the deed. In a suit by the wife, against the purchaser, after the death of the husband, to recover the property as her homestead, her declarations, made before leaving the state, showing dissatisfaction with the country and intention of leaving it permanently, are admissible in evidence as tending to show abandonment, even though not made to the purchaser or known to him at the time of his purchase. *Burcham v. Gann*, 1 U. C. 333.

(4.) The husband, who alone executed a bond to convey property owned and occupied as a homestead at the time of its execution, who afterwards removed with his family to a new home which he was providing for the family at the time, and abandoned the former home, may be compelled in a suit for specific performance to convey the title. If facts exist which would prevent the enforcement of a specific performance of the contract, an action for damages will lie for its breach against the husband when damage has been sustained.

Under article 16, section 50, of the State Constitution, mortgage liens, deeds of trust and deeds involving a condition of defeasance on the homestead are void, but this does not apply to a contract to convey at a future time when the property shall have lost its homestead character. *Goff v. Jones*, 70 T. 572.

(5.) A loan of money secured by a deed absolute on its face to the homestead of the debtor, contemporaneous with which is executed an agreement in writing to reconvey on the repayment of the money loaned, is invalid, either as a conditional sale or mortgage, when not signed and executed by the wife as required by the statute. *Moore v. Wills and Wife*, 69 T. 109.

(6.) Where the homestead is conveyed by deed regular in form and duly acknowledged by the wife and the deed is attacked on account of the insanity of the husband, such deed is not held to be void, but only voidable.

To avoid a deed the rules of equity demand that the party seeking the rescission must pay back the consideration received under the deed. This applies in case of homestead where the deed is avoided on account of the insanity of the husband.

Where the plaintiff asking rescission offers to do equity and the decree ascertains that plaintiff is owing a sum of money received under the deed, the decree should, on rescinding the contract, order sale of the property for the money owing after reasonable time for its payment. *Pearson et al. v. Cox*, 71 T. 246.

**ART. 561. Defective conveyance valid as a contract.**

(2.) A minor, nineteen years old, having an interest in land, signed, with her kindred, a deed, which purported to convey the interest of all. Before signing, she refused, when urged to do so, to declare to the officer that she was twenty-one years old, and, when the officer asked her age, one of those who had thus urged her, answered that she was twenty-one years old. She remained silent, but signed the deed. Her interest in the purchase money was never paid to her. In a suit brought on attaining her majority, to recover her interest in the land, *held*:

1. There being nothing to show that the officer acted as the agent of the purchaser in asking the minor's age, or that the purchaser was misled by her silence, he not being present when the deed was signed, her rights cannot be measured by those of an infant who has induced another person to receive a deed upon his false representation that he was of full age when he signed it. She is not bound by the deed.

The rule which requires one who seeks, on reaching the age of twenty-one years, to avoid a deed made during minority, to restore the purchase money, does not apply when the purchase money was received by a third party, and never reached the possession of the minor.

The fact that such third party was the recognized agent of the minor to receive the purchase money, is immaterial. A minor can make no agent to perform an act to his injury, and whether the act be beneficial or injurious, is left to the

minor's discretion on reaching full age. The object of the law which looks to the protection of minors would be defeated if they could, by interposing an agent, bind their estates in a manner which they are prohibited from doing in person. *Vogelsang v. Null*, 67 T. 465.

In trespass to try title brought by one who seeks to avoid a deed alleged to have been made by him during minority, and without consideration, when the copy of the deed is attached to the petition and made a part thereof, which recites a consideration paid, the plaintiff must not only establish that he was a minor when the deed was made, but that no consideration was in fact paid. In such a case when there is no offer to return a consideration for the land, it is incumbent on the plaintiff to show that he received none. *Wade v. Love*, 69 T. 522.

(4.) A purchaser induced to buy land by the fraudulent representations of the vendor as to its quality, situation and value, which he at the time believed and acted upon, may have the sale rescinded. 1 U. C. 188.

(5.) The owner of a strip of land in a town sold, in 1861, one end of it, declaring at the time that he intended to leave a street between the portion sold and the other end, pointing out the part to be used as a street, and declaring that he had other property that would be benefited by it. In 1876 the purchaser enclosed the lot so purchased, and the vendor then showed him the corners of his lot, declaring that the space, which was the usual width of a street, between it and the other end of the lot which he had sold, was left for a street. Other parties purchased afterwards and improved, with reference to the space referred to being a street, and relying on the declarations of the original owner to the effect that a call for a reservation of a street was not necessary, as he had given the space to the public for a street. In a suit to restrain the city from removing an inclosure on the strip of land claimed to have been dedicated, *held*:

1. That the facts constituted a dedication of the space as a street, so far as the owner could, by his own action, make a dedication.

2. But in a suit between the city authorities and the representatives of the original owner, before the city could assert control over the property as a street, it must appear that it had accepted the dedication.

3. Acceptance of the dedication may be implied on the part of the city, from acts clearly indicating a purpose to accept.

4. Acceptance of the dedication, on the part of the city, might also be implied, after continuous use by the public for such a period of time as would authorize the presumption of a grant, when adjacent improvements have been established with reference to the property as a street.

5. The English rule, that acceptance may be implied alone from long continued use by the public, cannot obtain in Texas as applicable to every case.

6. The city never having marked the space claimed to have been dedicated as a street, delineated it on its maps as a street, or claimed it otherwise as such, an acceptance of the dedication could not be implied.

7. Under the circumstances, the city council had power in 1880, by resolution, to authorize the mayor to relinquish its claim upon the property as a street, notwithstanding the equivocal use made of the property by the public.

8. Private parties cannot force upon a city the acceptance of a dedication of property as a street, with the incident burdens of repair and improvement, without the assent of its properly constituted authorities.

9. Without determining the rights of adjacent owners who purchased with reference to the dedication, the city had no control over the premises, and the occupant was entitled to an injunction to restrain it from removing his inclosure. *Gilder v. City of Brenham*, 67 T. 345.

In order that a city may claim rights under a proffer made by an individual to dedicate property for the use of the city, there must have been some act indicating, within a reasonable time, an acceptance of the dedication. *City of Galveston v. Williams*, 69 T. 449.

(6.) A deed in which a blank is left for the name of the grantor, and delivered to another with authority to fill the blank with the name of the purchaser, will, when the name of the grantor is inserted, operate as a conveyance. [*McCown v. Wheeler*, 20 T. 372; *Viser v. Rice*, 33 T. 139; *Threadgill v. Butler*, 60 T. 599.] *Dean v. Blount*, 71 T. 270.

## TITLE 20.—CORPORATIONS, PRIVATE.

### CH. 1.—PRELIMINARY PROVISIONS.

**ARTS. 562 to 564.** See Civil Statutes.

### CH. 2.—CREATION OF CORPORATIONS.

**ART.**

**565.** See Civil Statutes.

**566.** Purposes of a private corporation.  
*Amendment and annotated.*

**ART.**

**567 to 574.** See Civil Statutes.

**574a.** Foreign corporations must obtain  
a permit, etc. *New.*

#### **ART. 566. Purposes of a private corporation.**

The purposes for which private corporations may be formed are—

1. The support of public worship.
2. The support of any benevolent, charitable, educational, or missionary undertaking.
3. The support of any literary undertaking, the maintenance of a library, or the promotion of painting, music, or other fine arts.
4. The encouragement of agriculture and horticulture by associations for the maintenance of public fairs and exhibitions of stock and farm products.
5. The maintenance of a public or private cemetery.
6. The construction and maintenance of any species of road except a railroad and a bridge in connection therewith.
7. The construction and maintenance of a bridge.
8. The construction and maintenance of a telegraph or telephone line.
9. The establishment and maintenance of a ferry.
10. The establishment and maintenance of a line of stages.
11. The building and navigation of steamboats, and the carriage of persons and property thereon.
12. The supply of water to the public.
13. The manufacture and supply of gas, or of the supply of light or heat to the public by any means.
14. The transaction of any manufacturing or mining business.
15. The transaction of a printing or publishing business, and in connection therewith the sale of goods, wares, and merchandise of a stationery and blank book manufacturing business.
16. The establishment and maintenance of a hotel.
17. The erection of buildings and the accumulation and loan of funds for the purchase of real property in cities, towns, and villages.

18. The transportation of goods, wares, and merchandise, or any valuable thing.

19. The promotion of immigration.

20. The construction and maintenance of sewers.

21. The construction and maintenance of a street railway.

22. The erection and maintenance of market houses and market places.

23. The construction and maintenance of canals for the purposes of irrigation, navigation, or manufacturing.

24. The purchase and sale of goods, wares, and merchandise, and agricultural and farm products.\* The number of persons incorporating for such purposes shall in no instance be less than ten, nor shall any person hold or own more than five hundred dollars of such stock; and any person owning or holding more than five hundred dollars of such stock shall be liable for all the debts of such corporation.

25. The construction of harbors and canals on the coast of the Gulf of Mexico.

26. The growing, purchasing, and selling seeds, plants, trees, etc., for agricultural, horticultural, and ornamental purposes.

27. The construction and maintenance of mills and gins.

28. The accumulation and loan of money; but this subdivision shall not permit incorporations with banking or discounting privileges.

29. The construction and maintenance of stock-yards and pens.

30. The construction and maintenance of establishments for slaughtering, refrigerating, canning, curing, and packing meat.

31. The construction and maintenance of establishments for the preserving and canning of fruits, vegetables, and fish. [Amendment April 30, 1888; 20 Leg. S. S. p. 1.]

(\*) Subdivision 24 is the only one changed by the new law.

**ART. 566. Purposes of a private corporation.**

(3.) A corporation known as the "Masonic Mutual Benevolent Association" announced in its charter that its object was to provide for its members during life, and for their families after death. To accomplish this a contract is made with each member who joins it, that for a sum of money paid, and for designated installments of money to be paid afterwards, the association will, ninety days after his death, pay to designated beneficiaries a sum graduated in amount according to the length of time he lives after being a member. An examination by a physician is required of each member. Membership is forfeited by non-payment of assessments. *Held:*

1. The contract has all the elements of a life insurance policy, and though it may be entered into for benevolent purposes, the corporation cannot legally exist unless incorporated in accordance with the laws of the state regulating the incorporation of insurance companies.

2. The association cannot be legally incorporated as a benevolent association under title 20 of the Revised Statutes. *Farmer v. The State*, 69 T. p. 561.

(4.) The charter powers designated in the charter of the Guadalupe and San Antonio Rivers Stock Association were: 1, to protect all personal property belonging to its members against theft and other depredations, under the rules and

forms of law; 2. to raise means by uniform and equal taxation and assessments on the personal property of its members; 3. to confer with the governor and state authorities with the view of securing such protection; 4. to employ counsel, when necessary, to assist in the prosecution of the persons charged with crime; 5. to employ police and detectives, if necessary, to co-operate with the authorities of the law in ferreting out crime and affecting results. *Held*, that the charter was within the purview of subdivision 27, of article 566, of the Revised Statutes. (This subdivision was repealed by the act of March 27, 1885.) *Stock Association v. West*, 70 T. 391.

**ART. 574a. Foreign corporations.**

§1. **MUST OBTAIN PERMITS TO TRANSACT BUSINESS.** Hereafter any corporation for pecuniary profit (except as hereinafter provided), organized or created under the laws of any other state, or of any territory of the United States, or any municipality of such state or territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this state, or solicit business in this state, or establish a general or special office in this state, shall be, and the same are hereby, required to file with the secretary of state a duly certified copy of its articles of incorporation, and thereupon the secretary of state shall issue to such corporation a permit to transact business in this state. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes.

§2. **THOSE NOW DOING BUSINESS MUST COMPLY WITH LAW.** All such corporations now transacting business in this state shall have four months from the date when this act takes effect to comply with the conditions hereof by filing their articles of incorporation as provided in section 1 of this act.

§3. **CANNOT MAINTAIN SUIT, UNLESS CHARTER WAS FILED, ETC.** Thereafter no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made, or tort committed, the corporation had filed its articles of incorporation under the provisions of this act in the office of the secretary of state for the purpose of procuring its permit.

§4. **WHO NOT SUBJECT TO PROVISIONS OF THIS ACT.** The provisions of this act shall not apply to corporations created for the purpose of constructing, building, operating, or maintaining any railway, or to such corporations as are required by law to procure permits to do business from the commissioner of agriculture, insurance, statistics, and history.

§5. **FEES FOR PERMIT.** Such corporation shall, if its capital stock be one hundred thousand dollars or less, pay a fee of twenty-five dollars to procure such permit; if its capital stock be more than one hundred thousand dollars, and less than five hundred thousand dollars, it shall pay a fee of fifty dollars; if its capital stock be five hundred thousand dollars, and less than one million dollars,



it shall pay a fee of one hundred dollars; if its capital stock exceed one million dollars, it shall pay a fee of two hundred dollars.

§6. PERMITS LIMITED TO TEN YEARS. No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the secretary of state.

§7. COMPLIANCE WITH LAW, HOW SHOWN. Either the original permit or certified copies thereof by the secretary of state shall be evidence of the compliance of [on] the part of any corporation with the terms of this act. A certificate of the secretary of state to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this act.

§8. ACT OF APRIL 2D, 1887, REPEALED. The act of April 2d, 1887 (Art 574a), entitled: "An act to require foreign corporations to file their articles of incorporation with the secretary of state, and imposing certain conditions upon such corporations transacting business in the state, and providing penalties for a violation of the same," be, and the same is hereby, repealed. [Act April 3; July 6, 1889; 21 Leg. p. 87.]

### CH. 3.—POWERS AND DUTIES OF PRIVATE CORPORATIONS.

#### ART.

575. General powers of a corporation.

*Annotated.*

576 to 589. See Civil Statutes.

590. Stock transferable, how. *Annotated.*

#### ART.

591. Directors may require payment of stock. *Annotated.*

592, 593. See Civil Statutes.

594. Directors liable for debt of corporation, when.

#### ART. 575. General powers of a corporation.

(1.) A company incorporated under general statutory law acquires thereby no right other than a corporate existence, and no powers aside from those which the law declares the corporation may exercise, except such as are necessary and proper to the carrying on the business contemplated and authorized by the charter.

The charter of a street railway, incorporated under general law, can confer, in and of itself, no right to use any street, no matter what may be its provisions; such right to use must be acquired from the municipal government.

A city has the right to designate what particular portion of its street shall be occupied by the track of an incorporated street railway company. The grant of a right to use a street for a railway track will not preclude the city from granting a like privilege, over the same street, to another company, unless the right granted in the first instance could not be made available if the privilege conferred in the last grant were exercised. If the first grant be general, and the last specifies a particular portion of the street upon which the track may be laid, the enjoyment of the right under the specific grant will be protected when, under it, in the public interest, the road is constructed. *Fort Worth Ry. v. Rosedale Ey.* 68 T. 170.

(2.) The eleventh section of the act of 1874, relating to corporations, construed in connection with article 11, section 6 and section 35, must be regarded as meaning that "a corporation shall have succession by its corporate name for the period limited in its charter" for twenty years. *Steadman v. Bank*, 69 T. 50.

**ART. 590. Stock transferable, how.**

(1.) The charter of an incorporated land company provided that each share of stock issued should be received in payment of any land purchased of the company, at prices fixed by the board of directors, so as to secure a *pro rata* of lands among the stockholders. The by-laws provided that a stockholder should have the right to exchange his stock for lands, at prices fixed by a board of directors according to schedule made by an executive committee, and at the prices fixed by such schedule. The stock issued, on its face, stipulated that it was receivable for lands bought at prices fixed so as to secure a *pro rata* of the lands, or of their value among the stockholders; *held*:

1. The holder of a genuine certificate, on presenting it at the office of the company, and designating from its public schedules the land desired in exchange for his certificate, was entitled to receive the lands at the schedule rates on surrender of his certificates, and have title therefor. On refusal to make the title the stockholder has the right to enforce specific performance.

2. Such a suit for specific performance is not a suit for partition, and it is not necessary to allege and prove that such published schedules were so adjusted as to leave with the company an equal *pro rata* for the other stockholders.

3. After offer to surrender stock, and designation and demand for title, the corporation cannot affect the stockholder's right by altering the value of the land on the schedule. *Land Co. v. Bousselet*, 70 T. 422.

**ART. 591. Subscribers to stock required to pay, how.**

(1.) Stock was subscribed to create a Cotton Compress Company, under an agreement among the subscribers that a charter of incorporation should be obtained so soon as necessary steps could be taken, and a sufficient amount of stock subscribed to assure the success of the enterprise; it being agreed that the capital stock should not exceed thirty thousand dollars, which should be paid as might be required by rules to be adopted by the company. After thirty-four thousand dollars of stock had been subscribed, officers were elected at a meeting, all the subscribers participating, and agreeing that the capital stock should be fixed by charter at one hundred thousand dollars as the maximum, though it was agreed that so large an amount would not be needed. It was so fixed by charter. One who being present at such meeting was chosen a director, afterwards refused to pay the assessment on his stock required by the directors. There was no stipulation that the liability of a subscriber should depend on the fact that the full maximum of stock allowed by charter should be taken. In a suit brought to compel payment by such director on the assessment made, *held*:

1. The liability on the assessment resulted from the mutual agreement between the parties who subscribed stock before the grant of the charter, and by the subsequent action of the defendant in relation thereto, and did not depend on the subscription of the full amount of capital stock allowed by the charter. The promise to pay assessments made on subscriptions was binding, though the corporation was to be formed after the mutual agreement to pay was entered into.

2. The consideration which is necessary to sustain such a promise, is raised by inference of law from the subscription itself and the privileges thereby conferred; and from the same circumstance the law will infer a duty to pay the stock, and an implied obligation of equal force with an express contract when nothing appears repugnant to such construction.

3. The act of subscribing with others before the organization of the proposed corporation created a mutuality of contract which rendered the subscriber liable to the company after incorporation.

[This case distinguished from *Bridge Co. v. Chapin*, 6 Cush. 53; *Railroad Co. v. Gould*, 2 Gray, 278, and other cases referred to in opinion. Also from *Hotel Co. v. Bolton*, 46 T. 633.] *Compress Co. v. Saunders*, 70 T. 699.

**ART. 594. Directors liable for debt of corporation, when.**

(1.) The directors of a banking corporation are personally liable at the suit of an individual depositor for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the hands of the corporation solely by representations of solvency made to the general public by

the directors, who ought to have known, and by the use of ordinary care, such as it was their duty to have exercised, might have known, that such representations were false. They are liable when such false representations are knowingly made with intention to defraud the public generally; or when made in pursuance of a fraudulent combination, and common design upon their part to give to the corporation a fictitious credit that the business might be continued for the purpose of enabling such directors to collect loans claimed to have been made by them to the corporation. *Seale v. Baker*, 70 T. 283.

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## CH. 4.—MISCELLANEOUS PROVISIONS.

ARTS. 595 to 603. See Civil Statutes.

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## CH. 5.—DISSOLUTION OF PRIVATE CORPORATIONS.

ART.  
604 to 609. See Civil Statutes.

ART.  
610. Stockholder's liability for debts limited. *Annotated.*

ART. 610. Stockholder's liability for debts limited.

(1.) When a bank becomes insolvent, it may, under proper contract, transfer its assets to a new association, who may continue a similar business without incurring liability for the debts of the insolvent corporation. If, however, the shareholders of the insolvent bank agree with a new set of shareholders that the latter shall become substituted to the rights of the former in the corporate property and franchise, in consideration of their agreement to pay the debts to a specified amount, and the new organization, in its business, uses the seal of the insolvent bank, it becomes liable for its debts. *Savings Bank v. Sachtleben*, 67 T. 420.

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## CH. 6.—MACADAM AND PLANKROAD CORPORATIONS.

ARTS. 611 to 621. See Civil Statutes.

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## CH. 7.—TELEGRAPH CORPORATIONS.

ARTS. 622 to 627. See Civil Statutes.

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## CH. 8.—CANAL CORPORATIONS.

ART. 628. See Civil Statutes. (*Post*, Title 55.)

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## CH. 9.—GAS AND WATER CORPORATIONS.

ARTS. 629, 630. See Civil Statutes.

**T. 20, CHS. 10-14.] CORPORATIONS, PRIVATE. Arts. 631-644f.**

**CH. 10.—EDUCATIONAL CORPORATIONS.**

**ARTS. 631 to 636. See Civil Statutes.**

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**CH. 11.—RELIGIOUS, CHARITABLE AND OTHER CORPORATIONS.**

**ARTS. 637, 638. See Civil Statutes.**

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**CH. 12.—CEMETERY CORPORATIONS.**

**ARTS. 639 to 641. See Civil Statutes.**

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**CH. 13.—BRIDGE AND FERRY CORPORATIONS.**

**ARTS. 642 to 644. See Civil Statutes.**

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**CH. 14.—DEEP WATER CORPORATIONS.**

**ARTS. 644a to 644f. See Civil Statutes.**

## TITLE 21.—COUNTER-CLAIM.

## ART.

645 to 648. See Civil Statutes.

649. Certain and uncertain damages cannot be set off. *Annotated.*

## ART.

650. Matters incident to cause of action may be plead. *Annotated.*

## ART. 649. Certain and uncertain damages not to be set off.

(3.) As a general rule damages cannot be set off, unless they are mutual and between parties to the action. Damages claimed to have been caused by the alleged wrongful conduct of plaintiff's attorney in directing the execution of a writ, cannot be recovered under a plea in reconvention, filed by defendant, in which the attorney is sought to be made a party to a suit instituted to recover rent. *Casey v. Hanrick*, 69 T. 44.

## ART. 650. Matters incident to cause of action may be plead.

(1.) In an action on a promissory note for the purchase of land, and to foreclose the vendor's lien, the maker cannot plead in reconvention unliquidated damages, resulting to him from the action of the plaintiff in selling another tract of land for defendant, in violation of a trust, for less than its value. [*Duncan v. Magette*, 25 T. 251; *Carothers v. Thorp*, 21 T. 358; *Cato v. Phillips*, 28 T. 101.] *Riddle v. McKinney*, 67 T. 29.

In a suit to foreclose the vendor's lien by one holding purchase money notes for a steam mill, and the land on which it is situated, damages to the property occasioned by the bursting of the mill boiler, caused by the plaintiff muddying the water supplying the mill, by maliciously building hog pens on his own land adjoining the mill, and keeping hogs on the stream supplying the mill with water, cannot be pleaded by the defendant in reconvention, even though the plaintiff be alleged to be insolvent, and unable to respond in damages for his wrongful or malicious acts.

The defendant cannot plead failure of consideration in suit for purchase money, on account of damage to the property occasioned by the malicious acts of the plaintiff committed after the sale; and such is the case where the plaintiff is insolvent. *Fondren v. Leake*, 1 U. O. 151.

## TITLE 22.—COUNTIES AND COUNTY SEATS.

## CH. 1.—CREATION OF COUNTIES.

## ART.

651 to 653c. See Civil Statutes.

653d. Attached to election precincts.  
*Annotated.*

654 to 658. See Civil Statutes.

## ART.

658a. Debts of old county paid by new  
county, how. *New.*

659 to 666. See Civil Statutes.

## ART. 653d. Attached to election precincts.

(1.) The Legislature of Texas has almost uniformly treated an unorganized county as part of the county to which it is attached for judicial purposes, so far as the exercise of local governmental power over it is concerned. *Cattle Company v. Faught*, 69 T. 402.

## ART. 658a. New counties, or change in old counties.

§1. SHALL PAY PRO RATA INDEBTEDNESS OF OLD COUNTY. When any new county has heretofore been or may hereafter be created wholly and entirely out of any existing county, the new county shall bear and pay its *pro rata* portion of the indebtedness of the county from which it was taken, which indebtedness shall be estimated and apportioned upon the basis set forth in section 2 of this act.

§2. APPORTIONMENT OF INDEBTEDNESS, HOW MADE. The apportionment of such indebtedness shall be made upon the taxable values of the whole territory liable for such indebtedness as shown by the first assessment rolls made after the severance of such territory, and the territory severed shall pay that proportion of the entire indebtedness which its taxable values bear to the taxable values of the whole territory liable.

§3. COMPTROLLER SHALL COLLECT TAX FROM NON-RESIDENTS. It shall be the duty of the comptroller of public accounts to assess and collect from the non-residents of unorganized counties such rate of taxation, to pay the *pro rata* share of the debt due by such unorganized county, as the commissioners' court of the parent county shall levy on property in said parent county to pay such debt, and a certified statement of the commissioners' court making the levy in the parent county, giving the amount of the levy, shall be authority for his action.

§4. TAX SHALL BE LEVIED ON TERRITORY ATTACHED TO ORGANIZED COUNTY. When the territory taken is added to and made a part of an organized county, it shall be the duty of the commissioners' court of such county to levy and have collected on all property in such territory a tax sufficient to pay their *pro rata* of the indebtedness, said tax not to exceed the constitutional limit; and it shall be the duty of the commissioners' court of the county to which any unorganized county may be attached for judicial purposes, to levy and have collected on all property in such unorganized county

owned or held by resident citizens a tax for the purpose of paying such indebtedness.

§5. NEW COUNTY, WHEN ORGANIZED, SHALL LEVY AND COLLECT TAX. When any county heretofore or that may be hereafter created has organized, it shall be the duty of the commissioners' court of such county to levy and have collected on all property in this county such rate of taxation to pay the *pro rata* share of the debt due by such county as the commissioners' court of the parent county shall levy on property in said parent county to pay such debt.

§5a. TAXES DUE UNORGANIZED COUNTIES APPROPRIATED, HOW. All county taxes due unorganized counties collected by the comptroller, shall be kept by him to the credit of such unorganized county until the same shall have been organized, then he shall, upon demand of the treasurer of the former unorganized county, pay the same over to the said treasurer; *provided*, that in case any unorganized county is indebted to any county from which the same has been created, and which debt existed at the time of its creation, the comptroller shall use so much of said fund as may be necessary to pay the *pro rata* share of such debt due by such unorganized county, and an order of the commissioners' court of the parent county stating the amount due from the unorganized county, shall be authority for the comptroller to draw his warrant for said amount, and the provisions of this section shall apply to all money now held by the comptroller for unorganized counties, and to all money hereafter collected. [Act April 3; July 6, 1889; 21 Leg. p. 136.]

## CH. 2.—ORGANIZATION OF COUNTIES.

### ART.

667. Old county shall organize new one. *Annotated.*  
668 to 672. See Civil Statutes.

### ART.

673. Certificates of election issued by whom, and bonds taken. *Annotated.*  
674, 675. See Civil Statutes.

ART. 667. Old county shall organize new, when.

(1.) A county is a body corporate and politic, a creature of legislation, and its rights and liabilities cannot attach until it becomes a legal entity. The act of April 14th, 1883, "to create and provide for the organization of the county of Reeves" simply gave to the inhabitants of the territory included in the boundaries of the proposed new county the privilege of acquiring a corporate existence by perfecting the organization of a county government, which privilege they might exercise, or not, at their pleasure. The county of Reeves was created out of territory formerly embraced within the boundaries of Pecos county. The "illegal and wrongful acts and gross fraud" of the county judge and county commissioners' court of Pecos county in refusing to act in the organization of Reeves county, as alleged in the petition, do not give to Reeves county the right to recover from Pecos county the taxes collected from the inhabitants of the territory of Reeves county during the time intervening

between the passage of the act, and the organization of the county. The act took effect from its passage, and the citizens inhabiting the territory contained within the boundaries of the proposed new county, had the right to compel the county judge and county commissioners' court of Pecos county to proceed in the performance of their respective duties necessary to the organization of the new county. [High on Extraordinary Remedies, 431.] "Reeves county" could not have done so, because it was not a body corporate, invested with rights and powers and charged with responsibilities and duties, and had no legal existence, until the organization of its government was effected. [Revised Statutes, article 676; Ryan v. Evans, 49 T. 369.] Until the inhabitants of the territory embraced within the boundaries of the new county exercised the privilege which had been granted to them by the Legislature, by organizing their county government, they remained subject to the dominion of the government of Pecos county, and the acts of the officers of Pecos county, done in the performance of their official duties within the territory of Reeves county prior to its organization, were legal and valid. The taxes so collected, which constitute the principal sum sued for, having been legally collected and paid into the treasury of Pecos county before the organization of Reeves county, became the property of Pecos county, just as much as the money that was in the treasury of Pecos county at the time the act to create Reeves county became a law. [Revised Statutes, article 670; Clark v. Goss, 12 T. 397.] A new county created out of a portion of the territory of an original county independent of express provision therefor in the act creating the new county, cannot recover any part of the money and revenues belonging to the old county at the time of the organization of the new county. *Reeves Co. v. Pecos Co.*, 69 T. 177.

**ART. 673. Certificates of election issued by whom, and bonds taken.**

(1.) When the county judge and county commissioners have been elected with a view to the organization of an unorganized county, each member elect of the commissioners' court has thirty days after the election in which to qualify, by taking the official oath and executing the bond required by law. Two of such commissioners elected at such an election cannot, in connection with the county judge, organize the court before the others have qualified, and before the expiration of the time allowed by law for such qualification, and their orders under such attempted organization are void. *Cassin v. Zavalla County*, 70 T. 419.

### CH. 3.—CORPORATE RIGHTS AND POWERS.

**ART.**

676. See Civil Statutes.

677. Suits against county. *Annotated.*

**ART.**

678 to 685. See Civil Statutes.

**ART. 677. Suits against county.**

(1.) In a proceeding by *mandamus* against a county to compel the commissioners' court to issue a warrant on the county treasurer, and to levy a special tax provided for in the act of 1883 (page 41), to pay off a school claim, a cause of action is stated by alleging that plaintiff is owner of the claim which is described; that it had been audited by the former board; that it was unpaid, and that the county commissioners' court refused to pay or provide for its payment. The act of April 2d, 1883, contemplated that the audit made of a claim prior to that time should be considered sufficient evidence of its validity.

In a suit for such claims chargeable to the different school districts, it is not requisite that the petition should state how much is due from each one and define them, that fact the county records should show, and the law prescribes how the money to pay the claims must be obtained. *Caldwell County v. Harbert*, 68 T. 321.



## CH. 4.—COUNTY LINES.

## ART.

688 to 691a. See Civil Statutes.

691b. Line to be established by commissioner of general land office, when. *Amendment.*

## ART.

691c to 691e. See Civil Statutes.

**ART. 691b. Line to be established by commissioner of general land office, when.**

Should the surveyors above provided for fail to agree as to the true boundary line between their respective counties, the facts of such disagreement, with a full statement of the questions at issue between them, shall be by them reported to the commissioner of the general land office, whose duty it shall be to examine the disputed matter at once, and from such data as the maps and archives of his office furnish shall designate to such surveyors the line to be run, stating at what specific point they shall begin and to what specific point they shall run, adhering as nearly as possible to the line designated in the act creating such county line, which instruction shall be authority for said surveyors to run such line, and the line so run as above directed shall thereafter be the true dividing line between said counties. [Act April 2; July 6, 1889; 21 Leg. p. 42.]

NOTE. This act repeals the act of March 18, 1885, 19 Leg. p. 81 (Civil Statutes, article 691b), and re-enacts section 8, of the act of April 22, 1879, 16 Leg. p. 137.

## CH. 5.—COUNTY SEATS.

## ART.

692 to 700. See Civil Statutes.

701. County seat removed, when. *Annotated.*

## ART.

702 to 706. See Civil Statutes.

**ART. 701. County seat removed, when.**

(1.) The act of April 10th, 1879, regulating the removal of county seats, repealed all laws in conflict with its provisions, and neither it, nor any previous law, contained any provision by which it was declared what vote should be necessary to establish a county seat in a county which had been organized, but in which no county seat had been located. The act of March 28th, 1881, which added to the Revised Statutes, article 694a, prescribed the rule by declaring that a vote of two-thirds of all the electors voting in a newly organized county should be necessary to locate a county seat at a point more than five miles from the geographical centre of the county.

The act of April 12th, 1883, relating to the establishment of county seats, went no further than the act of April 10th, 1879, in providing a rule to determine what vote should be necessary to locate a county seat in a county already organized; it has no repealing clause, and did not, by necessary implication, repeal the act of March 28th, 1881.

Since the act of April 12th, 1883, does not, in terms, declare what proportion of votes cast shall be necessary to locate a county seat in an organized county, in

which no county seat has been fixed, the act of March 28th, 1881, has application to such a county, and must control. The county seat to be established in an organized county, in which none has been established, is to be deemed to be "the county seat first established."

A two-third vote of all the votes cast at an election to remove a county seat is required in all cases, except where the county seat is to be removed from a place not within five miles of the geographical centre of the county to a place within that distance of such centre. *Caruthers v. The State*, 67 T. 132.

(2.) An action by injunction in which a mandatory writ is asked to compel a public officer to transfer the public records to a place claimed by the petitioner to be the county seat, cannot be maintained at the suit of a private citizen, because he has no such interest in the question as entitles him to have it adjudicated; following *Walker v. Tarrant County*, 20 T. 20; *Harrell v. Lynch*, 65 T. 146, and *Ex parte Towles*, 48 T. 414.

A district court has no power to try cases of contested election for county seats, and a court of equity will not try and determine such a question on an application for injunction in cases involving the right to an office.

If, however, the action has its basis in the assertion of a right involving pecuniary interest, not originating in the election, an inquiry can be made as to legal effect of an election when the election is set up to defeat such a right; in such a suit, whatever may be the form of action, the vote on removing a county seat may be inquired into, and its proper legal effect determined. *Caruthers v. Harnett et al.*, 67 T. 127.

## TITLE 23.—COUNTY BOUNDARIES.

## ART.

707 to 728. See Civil Statutes.

728a. Brewster county. *Amendment.*

729, 730. See Civil Statutes.

730a. Buchel county. *Amendment.*

731 to 745. See Civil Statutes.

745a. Coke county. *New.*

746 to 779. See Civil Statutes.

## ART.

779a. Foley county. *Amendment.*

780 to 817. See Civil Statutes.

817a. Irion county. *New.*

818 to 821. See Civil Statutes.

821a. Jeff Davis county. *Amendment.*

822 to 933. See Civil Statutes.

**ART. 728a. Brewster.**

Beginning at the southeast corner of survey No. 36, certificate No. 3376, G. C. & S. F. Ry. Co.; thence south to the Rio Grande; thence down the Rio Grande to the southeast corner of survey No. 36, certificate No. 1906, block No. 16, G. H. & S. A. Ry. Co.; thence north to the Pecos county line; thence northwest along the Pecos county line to a point due north of Leoncita Springs; thence in a southwest direction to the place of beginning. [Amendment March 27, 1889; 21 Leg. p. 44.]

**ART. 730a. Buchel.**

Beginning at the northeast corner of Brewster county on the Presidio and Pecos county line; thence south with the east line of Brewster county sixty miles; thence east to the Rio Grande; thence down said river with its meanders to the Pecos county line; thence in a northwesterly direction along said Pecos county line to the place of beginning. [Amendment March 27, 1889; 21 Leg. p. 44.]

**ART. 745a, §1. Coke county created and limits defined.**

A new county, to be called Coke county, is hereby created out of Tom Green county, to-wit:

Beginning at the northwest corner of Runnels county for the northeast corner of Coke county; thence west 34 miles, following the south lines of Nolan and Mitchell counties, to a point to northwest corner of Coke county; thence south 27 miles to a point for southwest corner of said Coke county; thence east 34 miles to a point on the west line of Runnels county for southeast corner of Coke county; thence north 27 miles to beginning.

§2. COUNTY NAMED. Said county of Coke is named in honor of Hon. Richard Coke, United States Senator.

§3. ORGANIZATION OF THE COUNTY. D. T. Farley, Z. W. Withers, and T. A. Collier are hereby appointed a committee for the purpose of organizing said county of Coke, and they shall after the expiration of 30 days from the time this act takes effect lay off said county into four commissioners' precincts and convenient justices' precincts, not to exceed eight in number; also a convenient voting precinct for the election of county officers and designate places in

each of said precincts where elections shall be held. Said committee shall within ten days thereafter order an election to be held for county officers and for selection of a county seat for said county, and they shall appoint presiding officers of elections for each voting precinct as prescribed by law in other cases. The election returns shall be made to said committee, who shall count the votes and issue certificates of election to the persons elected, and shall approve the bonds of said officers and administer to them the oath of office. Said committee shall keep a record of all the proceedings and file the same in the office of the county clerk when elected, who shall record the same; that any two of said committee shall constitute a quorum for the transaction of business, and any one of said committee shall have power to administer the oath of office to the officers elected.

§4. **LIABLE FOR PRO RATA SHARE OF DEBT OF TOM GREEN COUNTY.** That the new county shall pay a *pro rata* share of the existing legal debts of the county from which it is taken, and there shall be set apart so much of the county taxes levied and collected on the property within said new county as shall be sufficient to speedily liquidate said existing debts, if any, and said *pro rata* to be based upon the value of the property for each year of the existence of said debt to be determined from the tax rolls of said county as made by the board of equalization.

§5. **ATTACHED TO JUDICIAL AND OTHER DISTRICTS.** The county of Coke is hereby attached to the thirty-fifth judicial district for judicial purposes, to the eleventh congressional, twenty-eighth senatorial, and eighteenth representative districts for purposes of representation. [Act March 13, 1889; 21 Leg. p. 86.]

**ART. 779a. Foley.**

Beginning at the southeast corner of Brewster county on the Rio Grande; thence north along the east line of Brewster county to the southwest corner of Buchel county; thence east along the south line of said Buchel county to the Rio Grande; thence up the Rio Grande with its meanders to the place of beginning. [Amendment March 27, 1889; 21 Leg. p. 44.]

**ART. 817a, §1. Irion County.**

A new county to be called Irion shall be created out of the area of Tom Green county, with boundary lines as follows: Beginning at a point on the south line of Tom Green county, due south of the northeast corner of survey No. 790, on Dove creek; thence north thirty miles; thence west to a point south of the southeast corner of Glasscock county; thence south thirty miles to the north line of Crockett and Schleicher counties; thence east to the place of beginning.

§2. **EXPENSE OF RUNNING BOUNDARY LINE PAID, HOW.** The expense of running and marking the boundary lines of the new

county shall be paid by the new county, and each surveyor engaged in running and marking any of said lines shall receive the sum of \$3 for each mile actually run and marked.

§3. ELECTION PRECINCTS ESTABLISHED, How. It shall be the duty of the county commissioners of Tom Green county, within ten (10) days from the enactment of this law, to lay off and divide said new county into convenient precincts for the election of county officers, and also to designate places in the new county where elections shall be held; all of which they shall cause a record to be made by the clerk, and a copy thereof shall be transmitted to the county judge of the new county.

§4. ELECTION FOR ORGANIZATION SHALL BE HELD. The county judge of Tom Green county shall immediately thereafter order an election for county officers and for the location of the county seat of said new county, and he shall appoint presiding officers, judges and clerks of election, and the election returns shall be made to the county judge of Tom Green county, who shall issue certificates to the persons elected, and shall approve the bonds of such officers and shall administer to them the oath of office.

§5. SHALL PAY ITS PRO RATA SHARE OF DEBT OF OLD COUNTY.

The new county shall pay its *pro rata* share of the existing legal debt of the county of Tom Green, and county commissioners of the new county shall levy and set apart annually a tax that will be sufficient to speedily pay off and discharge said debt.

§6. COUNTY ATTACHED TO JUDICIAL AND OTHER DISTRICTS. The new county shall be in the thirty-fifth judicial, the twenty-eighth senatorial, and the eightieth representative districts, and courts shall be held in said new county on the — — and may continue in session one week. [Act March 7, 1889; 21 Leg. p. 99.]

ART. 821a. Jeff Davis.

Beginning at the northwest corner of Brewster county, the southeast corner of survey No. 36, certificate No. 3376, G. C. & S. F. Ry. Co.; thence northwest to the northeast corner of survey No. 54, certificate No. 777, T. and P. Ry. Co., block No. 1; thence west to the northeast corner of survey No. 117, certificate No. 777, H. & T. C. Ry. Co., block No. 4; thence north to the southeast corner of survey No. 127, certificate No. 777, H. & T. C. Ry. Co., block No. 4; thence west to the southeast corner of El Paso county, on the Rio Grande; thence north along the east line of El Paso county to the corner of El Paso and Reeves counties; thence in a southeast direction along the former north boundary line of Presidio county to the northeast corner of Brewster county; thence along the north boundary line of Brewster county in a westwardly course to the place of beginning. [Amendment March 27, 1889; 21 Leg. p. 44.]

## TITLE 24.—COUNTY FINANCES.

## CH. 1.—GENERAL PROVISIONS.

## ART.

934 to 974. See Civil Statutes.

975. County treasurer shall keep accurate accounts with vouchers.  
*Amendment.*

## ART.

976 to 986. See Civil Statutes.

**ART. 975. County treasurer shall keep accurate accounts with vouchers.**

The county treasurer shall keep accurate accounts showing all the transactions of his office in detail, and all warrants by him paid off shall be punched at the time he pays them, and the vouchers relating to and accompanying each report shall be presented to the commissioners' court with the corresponding report, when it shall be the duty of said court to compare the vouchers with the report, and all proper vouchers shall be allowed and the treasurer credited with the amount thereof. [Amendment April 5, 1889; 21 Leg. p. 6.]

## CH. 2.—BONDS OF COUNTIES, ETC.

## ART.

986a. See Civil Statutes.

986aa. Hidalgo county authorized to issue bonds. *New.*

986b to 986A. See Civil Statutes.

## ART.

986AA. Counties authorized to compromise and settle debts. *New.*

986f to 986m. See Civil Statutes.

**ART. 986aa. County of Hidalgo.**

§1. **AUTHORIZED TO ISSUE BONDS.** The county commissioners' court of Hidalgo county is hereby authorized and empowered to issue the bonds of said county, with interest coupons attached, in such amount as may be necessary, not to exceed ten thousand dollars, to protect the court-house and jail of said county and other public property in the same vicinity from further erosion of the Rio Grande river, and to prevent further encroachment of said river; the said bonds running not exceeding ten years, redeemable at the pleasure of the county, and bearing interest at a rate not exceeding eight per cent. per annum.

§2. **TAX SHALL BE LEVIED.** The commissioners' court of said county shall levy an annual *ad valorem* tax on the property in said county sufficient to pay the interest and create a sinking fund for the redemption of said bonds, not to exceed one-eighth of one per cent. for any one year.

§3. NUMBER OF BONDS ISSUED. The county shall not issue a larger number of bonds than a tax of one-eighth of one per cent. annually will liquidate in ten years, and such bonds shall be sold only at their face or par value.

§4. INTEREST ON BONDS PAID, WHEN; ACCOUNT, HOW KEPT. The interest on said bonds shall be paid annually on the first day of July, and an account kept by the county treasurer of the amount of principal and interest paid on each.

§5. BONDS, HOW EXECUTED AND REGISTERED. The said bond shall be signed by the county judge and countersigned by the county clerk and registered by the county treasurer before they are delivered. [Act Mch. 14, 27, 1889; 21 Leg. p. 94.]

ART. 986hh. County authorized to compromise and settle debts.

§1. TERMS OF SETTLEMENT. The county commissioners' court of any county in this state is hereby authorized and empowered to compromise, compound, settle with, and to fund any existing indebtedness lawfully made and undertaken by such county by authority of law created prior to January 1st, 1889, and for this purpose the said commissioners' courts are hereby authorized and empowered to issue bonds in denominations of not less than five hundred dollars, with interest coupons payable annually, said bonds to become due and payable in twenty years from the date of their issuance; *provided*, that said bonds may be paid off at any time after two years from the date of their issuance if the commissioners' court should so elect; *and provided further*, that such bonds shall not be sold for less than their face or par value; said bonds to bear interest not exceeding six per cent. per annum. And the said commissioners' courts are further authorized and empowered to levy a tax upon all real and personal property situated in the county, not to exceed twenty-five cents on the hundred dollars on the assessed value of such property in any one year, to pay the annual interest and not less than two per cent. annually of the principal of said bonds, beside the expenses of assessing and collecting the same; and no bonds shall be issued under this act until a levy, as herein provided, shall have been made, and when said levy shall have been so made, the same shall continue in force until the whole amount of the principal and interest shall have been fully paid; *provided*, that nothing herein shall be construed to authorize any county to levy any tax in excess of that authorized by the constitution and the laws now in force; *provided further*, that it shall not authorize the taking up of bonds heretofore issued, and issuing new bonds in lieu thereof.

§2. TAXES, APPLIED HOW. All taxes levied under this act shall be applied solely to the objects for which they were levied, as follows:

1. To the payment of the expenses of assessing and collecting the same.

2. To the payment of the annual interest of said bonds and not less than two per cent. of the principal; and if there be any excess on hand, after making the above payments for the current year, it shall be used in the purchase and cancellation of said bonds, after the expiration of said five years, as hereinbefore provided.

§3. TAXES LEVIED AND COLLECTED, HOW. All taxes levied under this act shall be assessed and collected in the same manner and by the same officers whose duty it is to assess and collect the state tax, and they shall receive for their services one-fourth the rate of commissions allowed for assessing and collecting the state tax. The same remedies shall be used to enforce the collection of said taxes that are provided by law to enforce the collection of the state tax; *provided*, that such taxes shall be assessed and collected separately from that levied, assessed, and collected for current expenses of municipal government, and shall, when levied, specify in the act of levying the purpose therefor.

§4. COLLECTOR OF TAXES SHALL GIVE BOND. The officer whose duty it is to collect the taxes levied under this act shall give a bond, with two or more sufficient sureties, to be approved by the county commissioners' court, in a sum to be equal to double the estimated annual amount of said tax, which bond shall be payable to the county, and shall be conditioned for the faithful collection and payment of said tax into the county treasury.

§5. COUNTY TREASURER, DUTIES OF. It shall be the duty of the county treasurer to receive all moneys collected under this act, and to keep separate accounts thereof, and to pay out the same on warrants drawn by the order of the commissioners' court in the usual regular form.

§6. COLLECTOR SHALL PAY OVER MONEY, ETC. The collector of the taxes levied under this act shall pay over to the county treasurer, at the beginning of each and every month, all moneys he may have collected during the next preceding month, deducting his legal commission on the amount so paid, and he shall, at each regular meeting of the county commissioners' court, make a report of his collections and payments to the county treasurer since the next preceding term.

§7. BONDS ISSUED, HOW. All expenses necessary to give effect to the provisions of this act shall be paid out of the treasury of the county, and all bonds issued by any county under this act shall be signed by the county judge and attested by the clerk of the commissioners' court, with the seal of said court affixed thereto.

§8. CONFLICTING LAWS REPEALED. All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed. [Act April 4; July 6, 1889; 21 Leg. p. 89.]



## TITLE 25.—COUNTY TREASURER.

## ART.

987, 988. See Civil Statutes.

989. Oath and bond. *Annotated.*

990 to 993. See Civil Statutes.

## ART.

994. Money of county payable to treasurer. *Annotated.*

995 to 1000. See Civil Statutes.

## ART. 989. Bond for school fund.

(2.) An officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own. He is bound to account for and pay over the public money, less his commissions, or his sureties must pay it for him. This has been expressly decided in our own state, and also in frequent decisions of the Supreme Court of the United States. [Bogg v. State, 46 T. 10; Boyden v. United States, 13 Wallace, 17; United States v. Prescott, 3 Howard, 578; United States v. Morgan, 11 Howard, 154; United States v. Dashiell, 4 Wallace, 182.] Wilson v. Wichita County, 67 T. 647.

(3.) It is not necessary that the statement of a county treasurer's account should be passed on by the commissioners' court before the institution of suit against him for failing to pay over public money to his successor in office. If entitled to credits against the debt with which he is charged, he may plead and show them.

In a suit against a county treasurer for failing to pay over money to his successor in office, an allegation in the petition that the defendant failed to pay over to his successor in office the money sued for, is in effect, by reasonable intendment, an allegation that the successor had qualified to receive it, and is good on general demurrer.

A refusal of a former county treasurer to deliver to his successor in office the money in his possession belonging to the school fund, when requested so to do by the proper authorities, is a breach of that portion of his official bond which binds him to safely keep and faithfully disburse the school fund according to law. Wilson v. Wichita County, 67 T. 647.

## ART. 994. Moneys of county payable to treasurer.

(1.) Construing article 994, Revised Statutes, which refers to the duties of the county treasurer in regard to money belonging to the county; *held*, that no distinction can be made between general and special funds belonging to the county, and no authority exists in a commissioners' court to deprive the treasurer of the right to his commissions for receiving and paying out county funds, by directing their receipt and disbursement by any other person. In such case a right of action in favor of the treasurer exists to recover the amount allowed by law for receiving and paying out the money. Bastrop County v. Hearn, 70 T. 563.

T. 26, CHS. 1, 2.] COURTS, SUPREME & OF APPEALS. Arts. 1006, 1008.

## TITLE 26.—COURTS, SUPREME AND OF APPEALS.

### CH. 1.—JUDGES OF THE SUPREME COURT.

ARTS. 1001 to 1004. See Civil Statutes.

### CH. 2.—TERMS OF THE SUPREME COURT.

ART.

1005. See Civil Statutes.

1006. Counties returnable to Tyler;  
cases to be transferred.  
*Amendment.*

ART.

1007. See Civil Statutes.

1008. Counties returnable to Austin.  
*Amendment.*

1009, 1010. See Civil Statutes.

**ART. 1006. Counties returnable to Tyler; cases to be transferred.**

Appeals and writs of error from the counties of Anderson, Bowie, Camp, Cass, Cherokee, Delta, Ellis, Hopkins, Franklin, Gregg, Harrison, Henderson, Hunt, Kaufman, Marion, Morris, Nacogdoches, Navarro, Panola, Rains, Red River, Rockwall, Rusk, Sabine, San Augustine, Shelby, Smith, Tarrant, Titus, Upshur, Van Zandt, and Wood shall be returnable to the term of said court held at Tyler; and all cases from the county of Tarrant pending in the supreme court and the court of appeals at Austin, and undetermined at the adjournment of the term of said courts commencing on the first Monday of April, 1889, shall be transferred to Tyler, and entered upon the dockets of said courts at Tyler, and shall be tried and determined in the same manner as if said cases had originally been made returnable to the term of said courts held at Tyler. [Amendment February 21, 1889; 21 Leg. p. 6.]

**ART. 1008. Counties returnable to Austin.**

Appeals and writs of error from the counties of Andrews, Archer, Armstrong, Atascosa, Bailey, Bandera, Bastrop, Baylor, Bell, Bexar, Blanco, Borden, Bosque, Briscoe, Brown, Burnet, Caldwell, Callahan, Carson, Castro, Childress, Collingsworth, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crockett, Cochran, Clay, Coleman, Collin, Crosby, Dallam, Dallas, Dawson, Deaf Smith, Denton, Dickens, Dimmit, Donley, Eastland, Edwards, El Paso, Erath, Falls, Fannin, Fisher, Floyd, Frio, Gaines, Garza, Gillespie, Gray, Grayson, Greer, Guadalupe, Hale, Hall, Hamilton, Hansford, Hardeman, Hartley, Haskell, Hays, Hemphill, Hill, Hockley, Hood, Howard, Hutchinson, Jack, Johnson, Jones, Karnes, Kendall, Kent, Kerr, Kimble, King, Kinney, Knox, Lamar, Lamb, Lampasas, La Salle, Lee, Limestone, Lipscomb, Live Oak, Llano, Lubbock, Lynn, Martin, Mason, Maverick, McCulloch, McLennan, McMullen, Medina, Menard, Midland, Milam, Mitchell,

Montague, Moore, Motley, Nolan, Ochiltree, Oldham, Parmer, Palo Pinto, Parker, Pecos, Potter, Presidio, Randall, Reeves, Roberts, Robertson, Runnels, San Saba, Scurry, Shackelford, Sherman, Somervell, Stephens, Stonewall, Swisher, Taylor, Terry, Throckmorton, Tom Green, Travis, Uvalde, Wheeler, Wichita, Wilbarger, Williamson, Wilson, Wise, Yoakum, Young, and Zavala shall be returnable to the term of said courts held at Austin. [Amendment February 21, 1889; 21 Leg. p. 6.]

### CH. 3.—JURISDICTION OF THE SUPREME COURT.

ARTS. 1011 to 1016. See Civil Statutes.

### CH. 4.—THE CLERK OF THE SUPREME COURT.

ARTS. 1017 to 1025. See Civil Statutes.

### CH. 5.—REPORTERS TO THE COURTS.

ART.  
1026. Appointment and removal of reporters; their compensation. *New.*  
1027. Stationery furnished by printing board. *New.*  
1028. Records, etc., to be delivered to reporter; reports prepared for publication, etc. *New.*  
1029. Cases to be designated; manner of reporting. *New.*  
1030. Reports printed, when and how. *New.*  
1031. Requisites of volume; to be copyrighted and electrotyped. *New.*

ART.  
1032. Sale of reports, how made. *New.*  
1032a. Reports prepared under former laws not subject to this act. *New.*  
1032b. Laws in conflict herewith repealed. *New.*  
1032c. Expert printer removed for neglect of duty. Printing, etc., of reports done by contract, when and how. *New.*  
1032d. Counties required to pay for reports. *New.*  
1032e. Advance sheets may be sold, etc. *New.*

#### ART. 1026. Appointment and removal of reporters; their compensation.

The judges of the supreme court, after their election to each term of office, shall appoint some person or persons learned in the law, being a licensed attorney, to report the decisions of the supreme court, who shall be removable at the pleasure of the court, and who shall be paid for the services required by this act three thousand dollars per annum, payable monthly on the certificate of the chief justice. A reporter shall also be appointed by the judges of the court of appeals after their election to each term of office, who shall receive the same compensation allowed the reporter for

the supreme court, payable monthly on the certificate of the presiding judge of said court of appeals, discharge the same duties for said court of appeals, and who shall in like manner be removed at the pleasure of the said court, and all the provisions of this act regarding the reporter of the supreme court, and publishing the opinions thereof, shall apply to the court of appeals and the opinions of that court. [Substitute §1; March 6, 1889; 21 Leg. p. 7.]

**ART. 1027. Stationery furnished by printing board.**

The reporter shall be furnished by the state printing board with the necessary stationery for the performance of the duties imposed by this act. [Substitute, §2; March 6, 1889; 21 Leg. p. 7.]

**ART. 1028. Records to be delivered to reporter; reports prepared for publication.**

Each reporter shall obtain from the clerks of their respective courts the records of cases to be reported, with the briefs and opinions in such cases, as soon as such cases are finally disposed of and the opinions are recorded, which shall be returned after the report thereof is completed. They shall without delay, under the direction of their respective courts, prepare such decisions with appropriate syllabus, and statements when necessary, for publication in book form, and shall from time to time deliver the same to the secretary of state for the board of public printing as hereinafter provided. The secretary of state shall receipt for the same, and deliver to the expert printer appointed by the board of public printing for publication. [Substitute, §3; March 6, 1889; 21 Leg. p. 7.]

**ART. 1029. Cases to be designated; manner of reporting.**

The supreme court and court of appeals shall each designate by orders or otherwise the cases to be reported, and only such cases as are designated shall be reported and published, and only the main propositions made in the briefs and considered by the court in the opinion with the authorities cited in support of such propositions shall be incorporated in the report. [Substitute, §4; March 6, 1889; 21 Leg. p. 7.]

**ART. 1030. Reports printed, when and how.**

As fast as the board of public printing shall receive through the secretary of state the manuscript copy of reported cases for the reporter, said board shall cause the same to be printed, with proper index, tables of cases cited, and of cases reported, at the printing office of the Deaf and Dumb Asylum of Texas, and have one thousand copies bound of each volume of reports. The index, tables of cases cited, and of cases reported shall be prepared by the reporter. The expert printer appointed by the printing board shall after revising the printing deliver a revise as the work progresses to the reporter, who shall correct and return to said expert. [Substitute, §5; March 6, 1889; 21 Leg. p. 7.]

**ART. 1031. Requisites of volume; to be copyrighted and electrotyped.**

The decisions of each of said courts shall be printed and bound separate. Each volume shall not contain less than seven hundred pages nor more than eight hundred pages. Each page shall be twenty-six ems pica wide and forty-six ems pica long. The type used shall be long primer and minion of the same size used in volume 23 Wallace's United States Supreme Court Reports. The lines shall be leaded with not thicker than eight to pica leads. The paper, presswork, and binding shall be of the same style and at least equal quality in every respect with the volumes of Moore & Walker's Reports heretofore published. The volumes containing the supreme court decisions shall be styled "The Texas Reports," and those containing the decisions of the court of appeals shall be styled "The Court of Appeals Reports," and they shall be so respectively styled on the title page and back, and the volumes shall be numbered in continuation of present number. The name of the reporter may be printed on the back of each volume. Each volume shall be copyrighted in the name of the reporter, who shall immediately on delivery of the edition transfer and assign the same to the state. It shall be electrotyped and the plates shall be owned by the state and preserved by the secretary of state. [Substitute, §6; March 6, 1889; 21 Leg. p. 7.]

**ART. 1032. Sale of reports, how made.**

When printed and bound, the reports shall be delivered to the secretary of state, who shall sell single copies for \$2, exclusive of postage or express charges, and he shall also for the same price sell single copies of any former volume of reports for either of said courts heretofore published under the state's copyright, and now owned by the state. The secretary of state shall deliver to the state treasurer the proceeds of all sales so made by him, of which and of his operations under this act, and of the transactions of the said board hereunder, he shall make a full statement and showing in his biennial report. [Substitute, §7; March 6, 1889; 21 Leg. p. 7.]

**ART. 1032a. Reports prepared under former laws not subject to this act.** Nothing contained in this act shall be held to apply to volumes of reports the manuscript of which is now in the hands of the present reporters or their publishers, or which may now be in course of publication under a contract made in pursuance of existing laws, but the same shall be received by the secretary of state and paid for under the law in force (out of any money in the treasury not otherwise appropriated) prior to the passage of this act; *provided*, this section shall not be construed as to the supreme court reporter to extend their publication under this section beyond

T. 26, CH. 5.] COURTS, SUPREME & OF APPEALS. Arts. 1032b-1032e.

the 71st volume, nor as to the court of appeals reporter so as to extend their publication under this section beyond the 27th volume. [Substitute, §8; March 6, 1889; 21 Leg. p. 7.]

**ART. 1032b. Laws in conflict herewith repealed.**

That an act to amend articles 1026, 1027, 1028, 1029, 1030, 1031, and 1032, of chapter 5, title 26, and articles 1077, 1078, 1079, 1080, 1081, and 1082, of chapter 15, title 26, of the Revised Civil Statutes of the State of Texas, approved February 21st, 1879, approved May 1st, 1882, together with all other laws in conflict herewith, be, and they are hereby, repealed. [Substitute, §9; March 6, 1889; 21 Leg. p. 7.]

**ART. 1032c. Expert printer removed for neglect of duty. Printing of reports done by contract, when.**

Should the expert printer, whose duty it is to supervise and have promptly executed the printing, binding, and delivering of the reports to the secretary of state, fail to have the work executed with promptness and in accordance with the provisions of this act, he shall be removed from his trust and another appointed; and whenever the board of public printing shall ascertain that the work of printing and binding the reports can be done more speedily, better, and more economically by contract, or that ample material and means to carry out the provisions of this act are not at their control, they shall at once let the printing and binding of the reports out by contract, requiring security for the performance of the work and the delivery to the state of the electrotypes plates. [Substitute, §10; March 6, 1889; 21 Leg. p. 7.]

**ART. 1032d. Counties required to pay for reports.**

No copies of reports shall be furnished to any county except upon payment made by such county to the secretary of state, as in sale to private parties. [Substitute, §11; March 6, 1889; 21 Leg. p. 7.]

**ART. 1032e. Advance sheets may be sold, etc.**

The secretary of state may transmit advance sheets of the reports as the publishing progresses on receiving two dollars for the volume, the purchaser to have the right on returning all the forms of the volume to the secretary of state, to have the same bound without further expense on his paying the expense of transmitting the same to and from the state department. [Substitute, §12; March 6, 1889; 21 Leg. p. 7.]

## CH. 6.—PROCEEDINGS IN CIVIL CASES IN THE SUPREME COURT AND COURT OF APPEALS, ETC.

## ART.

1033. See Civil Statutes.

1034. Transcript must be filed, when.  
*Amendment.*

1035, 1036. See Civil Statutes.

## ART.

1037. Assignments of error. *Annotated.*

1038, 1039. See Civil Statutes.

**ART. 1034. Transcript must be filed, when.**

When an appeal from any final judgment of a district or county court has been taken and an appeal-bond has been filed, or when an appeal has been taken in cases where no appeal-bond is required, or when a citation has been served on a petition for a writ of error, it shall be the duty of the appellant or plaintiff in error to file a transcript of record with the clerk of the supreme court or court of appeals, at the place where such appeal or writ of error is returnable, on or before the first day of the term to which the same is so returnable that is held next succeeding the term when the appeal was perfected or the citation for writ of error was served, or on or before the first day in such term designated for the trial of causes from the county in which such appeal or writ of error was taken; *provided, however*, that if such appeal was perfected or such citation in error was served less than twenty days before the said first day of the term next succeeding the taking thereof, or less than twenty days before the first day of the term in said term designated for the trial of causes brought from the county in which such appeal or writ of error was taken, then such transcript shall be filed at the next succeeding term thereafter in the same manner; *and provided also*, that where a party is unable to file such transcript in the time limited by this article, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period.

*And provided further*, that whenever any civil cause in which the State of Texas is a party has been or may be tried during a term of the district court while the supreme court is in session, the power of the district court to revise or set aside its judgment shall terminate within ten days after the rendition of any judgment therein which assumes to finally dispose of said cause, unless there has been or shall be a new trial awarded within that period, and the jurisdiction of the supreme court than sitting shall immediately attach, to affirm, or reverse, or reverse and render said judgment, on the filing by either party of the transcript of the proceedings in said cause in the supreme court, five days' notice of the intention to file such transcript being first given to the adverse party or to his counsel, and bond being given when the same is required. [Amendment May 12, 1888; S. S. p. 2.]

T. 26, CHS. 7-10.] COURTS, SUPREME & OF APPEALS. Arts. 1037, 1048.

**ART. 1037. Assignments of Error.**

(1.) An assignment of error which is neither signed by the complaining party nor by his counsel, cannot be considered. When signed by neither, only such fundamental errors as are apparent on the face of the record can be considered. *Fordyce v. Dixon*, 70 T. 694.

(2.) The court will not refuse to consider assignments of error filed after the filing of the writ of error bond, unless it appears that such assignments have operated to the prejudice of the opposing party. *Railway v. Gentry*, 69 T. 625.

(3.) In the following cases assignments of error were held to be insufficient: *O'Neil v. Bank*, 67 T. 38; *Smith v. Whitfield*, 67 T. 124; *Blake v. Ins. Co.*, 67 T. 160; *Railway v. Rediker*, 67 T. 181; *Richardson v. Levi*, 67 T. 359; *Hughes v. Railway*, 67 T. 595; *Jackson v. Cassiday*, 68 T. 282; *Goe v. Montgomery*, 68 T. 340; *McClure v. Sheek's Heirs*, 68 T. 426; *Mynders v. Ralston*, 68 T. 498; *Blessingame v. Davis*, 68 T. 595; *Blackwell v. Hunnicutt*, 69 T. 273; *Bumpass v. Morrison*, 70 T. 756.

An assignment that "the court erred because the judgment is not supported by the evidence," is not a compliance with the statute or rules of the supreme court, it being too general. *Ackerman v. Huff*, 71 T. 317.

(5.) An assignment of error, though contained in the record, if not contained in the brief of counsel, will, under rule 29, be considered as waived. *Hughes v. Railway*, 67 T. 595.

(6.) An assignment of error to the admission of evidence must rest upon the objection made in the trial court. *Railway v. Hogsett*, 67 T. 685.

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**CH. 7.—HEARING CAUSES.**

**ARTS. 1040 to 1046.** See Civil Statutes.

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**CH. 8.—JUDGMENT OF THE COURT.**

**ART.**

1047. See Civil Statutes.

1048. Reversal, judgment on. *Annotated.*

**ART.**

1049, 1050. See Civil Statutes.

**ART. 1048. Reversal, judgment on.**

(1.) When a judgment appealed from can properly be reformed and rendered, and the appellant could, upon proper notice, have had the judgment corrected in the court below, and thus have rendered an appeal unnecessary, he will be taxed with the costs of appeal in addition to the costs adjudged against him below. *Helm v. Weaver*, 69 T. 143.

(5.) Error in the judgment as to one defendant is ground for reversing the entire judgment. *Brown v. Mitchell*, 1 U. C. 373.

When the justice of a case will be reached by reversing as to one defendant and affirming as to another, it may be done. *Blum v. Strong*, 71 T. 321.

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**CH. 9.—REHEARING.**

**ARTS. 1051 to 1055.** See Civil Statutes.

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**CH. 10.—EXECUTION OF JUDGMENT.**

**ARTS. 1056 to 1060.** See Civil Statutes.

(U—Sup. Tex. Stat.)

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T. 26, CHS. 11-17.] COURTS, SUPREME & OF APPEALS. Art. 1085a.

## CH. 11.—JUDGES OF THE COURT OF APPEALS.

ARTS. 1061 to 1065. See Civil Statutes.

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## CH. 12.—TERMS OF THE COURT OF APPEALS.

ARTS. 1066, 1067. See Civil Statutes, and, *ante*, Arts. 1006 to 1008.

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## CH. 13.—JURISDICTION OF THE COURT OF APPEALS.

ARTS. 1068 to 1070. See Civil Statutes.

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## CH. 14.—CLERKS OF THE COURT OF APPEALS.

ARTS. 1071 to 1076. See Civil Statutes.

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## CH. 15.—REPORTER TO THE COURT OF APPEALS.

ARTS. 1077 to 1082. See, *ante*, Ch. 5, Arts. 1026 to 1032e.

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## CH. 16 —SPECIAL PROVISIONS RELATING TO THE COURT OF APPEALS.

ARTS. 1083 to 1085. See Civil Statutes.

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## CH. 17.—COMMISSIONER OF APPEALS.

ART. 1085a.

§1. Appointment, qualifications, terms, salary, etc., of commissioners.  
*Amendment.*

§§2 to 4. See Civil Statutes.

ART. 1085a.

§5. The Supreme Court may refer cases, etc. *Amendment.*

§§6 to 14. See Civil Statutes.

ART. 1085a, §1. **Appointment, qualifications, term, salary, etc., of commissioners.**

A commission of arbitration and award is hereby created, to be styled "The Commission of Appeals of the State of Texas." Said commission shall be composed of three persons, who shall be learned in the law and possess the same qualifications and receive the same salaries as judges of the supreme court, who shall be appointed by

the governor, by and with the advice and consent of the senate if in session, and who shall hold their offices for two years, except as herein otherwise provided. The first appointment made under this act shall be made to take effect on the first day of April, 1889, and the judges so appointed shall hold their offices for two years, and thereafter appointments made under this act shall be made biennially. In case of a vacancy on said commission by death, resignation, or otherwise, of any member thereof during the vacation of the Legislature, it shall be the duty of the governor to fill the same by appointment; and the person so appointed shall continue in office until the next regular session of the Legislature after the appointment. [Amendment March 26, 1889; 21 Leg. p. 49.]

§5. THE SUPREME COURT MAY REFER CASES TO SAID COMMISSION; NOTICE TO PARTIES IN SUCH CASES. The supreme court is hereby authorized and empowered to refer to said commission of appeals any case or cases now or hereafter pending before said court for examination and report thereon. And it shall be the duty of said supreme court, in order to relieve the docket of said court of the great number of cases incumbering the same, from time to time to refer to said commission of appeals so many of said cases now or hereafter pending in said court as may be reasonably considered and acted upon by the same at the several sessions thereof; *provided*, that when any case is referred by the supreme court to said commission of appeals, the counsel for both parties, or the parties themselves, shall be entitled to notice, and shall have the right to be heard upon the same as if said cause was tried by the supreme court, which notice shall be given by registered letter sent by mail, addressed to the parties or their attorneys of record. And five days after the delivery thereof, said cause shall be ready for submission, and no other costs shall be incurred for said notice save the postage thereon. And said commission of appeals shall make rules regulating the hearing of causes submitted or referred to the same. [Amendment March 26, 1889; 21 Leg. p. 49.]

## TITLE 27.—COURTS, DISTRICT.

## CH. 1.—THE JUDGE OF THE DISTRICT COURT.

## ART.

1086 to 1092. See Civil Statutes.

1092a. Appointment of judge. *Annotated.*

1093. See Civil Statutes.

## ART.

1094. Election of special judge. *Annotated.*

1095 to 1100. See Civil Statutes.

## ART. 1092a. Appointment of judge.

(1.) Under article 4, section 14, of the Constitution of 1845, where the district judge had been of counsel, and was disqualified, the parties could, by consent, appoint a proper person to try the cause. In a suit by publication, the judge being disqualified, the plaintiff selected a special judge, who proceeded to render judgment by default. The selection by the plaintiff not being an appointment by the parties, there was no jurisdiction, and the judgment rendered in the cause was void. *Mitchell v. Adams*, 1 U. C. 117.

## ART. 1094. Election of special judge.

(1.) A decree of divorce is not invalidated because rendered by a special district judge who, at the time the trial began, was the county judge of the county. Even if he be such an officer as is forbidden under the Constitution to hold another office, the acceptance and discharge of the duties of another office would operate an abandonment of the office to which he had formerly qualified. *Alsop & Thompson v. Jordan*, 69 T. 300.

## CH. 2.—THE CLERK OF THE DISTRICT COURT.

## ART.

1100a to 1105. See Civil Statutes.

1106. Seal to be used by district clerk. *Annotated.*

## ART.

1107 to 1116b. See Civil Statutes.

## ART. 1106. Seal to be used by district clerk.

District clerks are not required by statute or practice to attach their seal of office to their official certificates to affidavits, file marks, etc., for use in the court where made. *Eiter v. Dugan*, 1 U. C. 175.

## CH. 3.—THE POWERS AND JURISDICTION OF THE DISTRICT COURT, ETC.

## ART.

1117. Original jurisdiction of district court. *Annotated.*

## ART.

1118 to 1126a. See Civil Statutes.

## ART. 1117. Original jurisdiction of district court.

The district court has no jurisdiction of a suit when the sum sued for is just five hundred dollars. [*Carroll v. Slik*, 70 T. 23.] *Garrison v. Express Co.*, 69 T. 345.

This is a suit to recover the sum of five hundred and five dollars and eighty-nine cents, balance alleged to be due plaintiff for money paid for the benefit of the defendant, after deducting certain credits to which the petition admitted the appellant was entitled. Judgment by default was rendered for the plaintiff below for the sum of five hundred and twenty-six dollars and thirty cents. Subsequently the defendant moved to set aside this judgment, alleging excuses for his

failure to appear and plead, and, further, that he was entitled to other credits besides those admitted in the petition. The court having intimated that it would grant the motion, the plaintiff remitted all the amounts claimed as credits by the defendant, and took judgment for the balance, and the motion was overruled. The defendant also moved to dismiss the cause because the remittitur, taken in connection with the pleadings and motion for new trial, showed that the court had no jurisdiction of the subject matter of the suit. The refusal of the court to grant this motion is the subject of the only assignment of error relied on.

Had the credits claimed in the motion for a new trial been allowed in the petition, the amount sued for would have been insufficient to give the court jurisdiction of the cause. But the sum claimed in the petition was over five hundred dollars, and upon its face the court had jurisdiction. The amount claimed in the petition determines the jurisdiction, and that question is concluded by its averments, unless it otherwise appears that an attempt has been made, through improper averments, to give the court cognizance of a cause which it is not authorized to adjudicate. [Dwyer v. Bassett, 63 T. 274; Tidball v. Eichhoff, 66 T. 58.] Ratigan v. Holloway, 69 T. 468.

Where the demand sued for amounted to \$466, and \$200 consequent, additional and necessary damages was also claimed, the subject of litigation was within the jurisdiction of the district court. Dahoney v. Allison, 1 U. C. 112.

#### CH. 4.—THE TERMS OF THE DISTRICT COURT.

##### ART.

1127. See Civil Statutes.

1128. Adjournment of term where there is no judge. *Annotated.*

##### ART.

1128a, 1128b. See Civil Statutes.

ART. 1128. Adjournment of term where there is no judge.

(2.) The word "morning," as used in this section, includes the period of time between sunrise and twelve o'clock M., and if the sheriff of a county fails to adjourn the court on the morning of the fourth day of the term when the district judge had not appeared during the term until that time, and the judge should appear at any time before twelve o'clock M. of the fourth day and proceed to hold the term, a previous election of a special judge on the morning of that day is operative to invest him with authority to preside as judge for the term. *Railway v. Douglass*, 69 T. 694.

#### CH. 5.—MISCELLANEOUS PROVISIONS RELATING TO THE DISTRICT COURT.

ARTS. 1129 to 1132. See Civil Statutes.

## TITLE 28.—COURTS, COUNTY.

## CH. 1.—THE COUNTY JUDGE.

## ART.

1133 to 1137. See Civil Statutes.

1138. Disqualification of judge. *Annotation.*

## ART.

1139 to 1141. See Civil Statutes.

## ART. 1138. Disqualification of judge.

(2.) Though original jurisdiction is conferred by the Constitution on the district court over causes which the county judge is disqualified to try, such suits may be begun in the county court.

When the suit is brought in the county court during the disqualification of the county judge, and is transferred to the district court, the original jurisdiction of the district court at once attaches, and the cause proceeds as if originally instituted there—in such case the jurisdiction of the district court is original, and not appellate, and the cause may proceed to trial on the original petition. *Smith Brothers v. Hardin*, 68 T. 120.

When a cause is removed to the district court from the county court on account of the disqualification of the county judge, the original jurisdiction of the district court immediately attaches, and the cause proceeds to trial as if originally instituted there. Such jurisdiction is original, and it is immaterial whether the county court's jurisdiction had properly attached or not. *Cleveland v. Tufts*, 69 T. 580.

## CH. 2.—THE CLERK OF THE COUNTY COURT.

ARTS. 1142 to 1160. See Civil Statutes.

## CH. 3.—THE POWERS AND JURISDICTION OF THE COURT AND OF THE JUDGE THEREOF.

ARTS. 1161 to 1172. See Civil Statutes.

## JURISDICTION DIMINISHED OR RESTORED IN THE FOLLOWING NAMED COUNTIES:

Brazos, 1172aa.  
Donley, 1172o, 1172s.  
Greer, 1172o, 1172s.  
LaSalle, 1172cc.

Mills, 1172cc.  
Travis, 1172dd.  
Wilson, 1172o.

## ART. 1172aa. Brazos county.

§1. CIVIL JURISDICTION RESTORED TO COUNTY COURT. The county court of Brazos county shall have exclusive original jurisdiction in all civil cases when the matter in controversy shall exceed in value two hundred dollars and not exceed five hundred dollars, exclusive of interest, and concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred

and not exceed one thousand dollars, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. It shall have appellate jurisdiction in civil cases of which justices' courts have original jurisdiction, under such regulations as are now or may hereafter be prescribed by law. In all appeals from justices' courts, there shall be a trial *de novo* in the county court, and an appeal shall lie to the court of appeals under such regulations as are now or may be prescribed by law. The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians, transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the settlement, partition, and distribution of estates of deceased persons and to apprentice minors as provided by law. And the county court or judge thereof shall have power to issue writs of *mandamus*, injunctions, and all other writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of *habeas corpus* in cases where the offense charged is within the jurisdiction of the county court or any other court or tribunal inferior to said court.

§2. All causes now pending in the district court of Brazos county of which the county court of said county has jurisdiction under the provisions of this act, and all laws giving jurisdiction to the county court, shall be transferred to the county court of said county.

§3. The clerk of the district court of Brazos county, thirty days from the date this act takes effect, shall transfer to the clerk of the county court of said county all the original papers in causes transferred under this act, together with a certified transcript of all the entries made on the docket of the district court in such causes, and a certified bill of all costs accrued in such causes, and for making out such transcript of the docket, the clerk of the district court shall be allowed such fees as are now allowed by law for making out transcripts in cases of appeal, such fees to be taxed as cost in such suits.

§4. All laws and parts of laws in conflict with the provisions of this act be, and the same is [are] hereby, repealed. [Act April 3, 1889; 21 Leg. p. 82.]

**ART. 1172cc. La Salle and Mills counties.**

§1. JURISDICTION OF COUNTY COURTS OF, LIMITED. The county courts of La Salle and Mills counties shall have and exercise the general jurisdiction of a probate court; shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards; settle accounts of executors, administra-

tors, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the partition, settlement, and distribution of estates of deceased persons, and to apprentice minors as prescribed by law, and to issue all writs necessary for the enforcement of its own jurisdiction, and to punish contempts under such provisions as may be prescribed by general laws governing county courts, and to have and exercise general jurisdiction over questions of eminent domain as prescribed by law, but said county courts shall have no other jurisdiction, civil or criminal.

§2. CLERKS SHALL MAKE TRANSCRIPTS OF ORDERS, ETC. It shall be the duty of the county clerks of La Salle and Mills counties, within twenty days after the passage of this act, to make a full and complete transcript of all orders on the dockets of said county courts in cases still pending in said courts, of which cases the district courts of said counties shall have exclusive jurisdiction, and to deliver said transcript, together with the original papers in such cases and a certified bill of costs in each case, to the clerks of the district courts of said counties, and said district clerks shall enter said cases on the dockets of the district courts of said counties for trial by said district courts, and all process now issued and returnable to the county courts of said counties of which the district courts are given jurisdiction by this act, shall be returnable to the district courts of said counties by the officer executing the same, and all cases transferred by this act shall stand on the docket of the district courts of counties as appearance cases, and shall be tried by the district courts of said counties as other cases, and the said district courts shall exercise all the civil and criminal jurisdiction heretofore vested in said county courts by the constitution and laws, but directed by this act.

§3. APPEALS FROM JUSTICES' COURTS, ETC., RETURNABLE TO DISTRICT COURT. All appeals from justices' and mayors' or recorders' courts of said counties shall be to the said district courts, and the district courts may render judgment on all cost bonds heretofore filed, or that may be filed in said counties up to the time this act takes effect in the county courts of said counties.

§4. EXECUTIONS ISSUED, HOW; JURISDICTION AS TO INJUNCTION SUITS, ETC. The clerks of the county courts of said counties shall issue execution upon all judgments that may have been rendered in said courts, and collect the same as now allowed by law, but all suits that may arise out of any execution by injunction or trial of the rights to property, shall be filed in and tried by the district courts of said counties.

§5. CONFLICTING LAWS REPEALED. That all laws in conflict with this act be, and the same are hereby, repealed. [Act March 27, 1889; 21 Leg. p. 109.]

**ART. 1172dd. Travis county.**

§1. JURISDICTION OF COUNTY COURT OF. The county court of Travis county shall have and exercise the general jurisdiction of a probate court; shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians, transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis*, and common drunkards, including the settlement, partition, and distribution and settlement of estates of deceased persons, and to apprentice minors as provided by law, and issue all writs necessary to the enforcement of said jurisdiction; to punish contempt under such provisions as are or may be provided by general law governing county courts throughout the state, but said county court of Travis county shall have no other civil jurisdiction whatever.

§2. JURISDICTION AS TO CRIMINAL MATTERS. Said county court shall have and exercise such jurisdiction over and pertaining to criminal matters and proceedings as by general law of this state is conferred upon county courts.

§3. JURISDICTION OF DISTRICT COURT OF TRAVIS COUNTY. The district court of Travis county shall have and exercise jurisdiction in all civil matters and causes over which by the laws of the state the county court of said county would have jurisdiction, except as provided in section one of this act; and all causes other than probate matters and such as are provided by sections one and two of this act, be, and the same is [are] hereby, transferred to the district court of said Travis county; and all writs and process relating to civil matters heretofore issued by or out of said county court of Travis county other than those pertaining to matters over which by section one of this act jurisdiction is given to said county court of said county, be, and the same is [are] hereby, made returnable to the next term of the district court of Travis county, Texas.

§4. CASES TRANSFERRED TO DISTRICT COURT. The county clerk of the said Travis county be, and he is hereby, required, within twenty days after the passage of this act, to make a fair and complete transcript of all entries upon his civil dockets heretofore made in causes which by section three of this act are transferred to the district court of said county, and deliver the same to the district clerk of said county, together with all the papers to such causes pertaining, and all such causes shall be immediately docketed by said district clerk, and such civil cases so transferred shall stand on the docket of said court as appearance cases for the next succeeding term of said court.



§5. JUDGMENTS ENFORCED BY PROCESS FROM COUNTY COURT. This act shall not be construed to in any manner affect judgments heretofore rendered by said county court of Travis county pertaining to matters and causes which by section three of this act are transferred to the district court of said county, but the county clerk of said county shall issue all executions and orders of sale as the judgments in such cases require, and such executions and orders of sale and proceedings thereunder shall be as valid and binding to all intents and purposes as though the change had been made as by section three of this article is contemplated.

§6. CONFLICTING LAWS REPEALED. All laws and parts of laws in conflict with the provisions of this act be, and they are hereby, repealed. [21 Leg. p. 139.]

[NOTE. The foregoing act originated in the house, and passed the same by a vote of 71 yeas, 9 nays; and passed the senate by a vote of 15 yeas, 12 nays. It was presented to the governor for his approval on the third day of April, 1889, and was not signed by him or returned to the house in which it originated with his objections thereto within the time prescribed by the constitution, and thereupon became a law without his signature. J. M. MOORE, Secretary of State.]

ART. 1172o. Wilson county.

§1. JURISDICTION RESTORED TO COUNTY COURT OF. The county court of Wilson county shall hereafter have exclusive original jurisdiction in civil cases where the matter in controversy shall exceed in value two hundred dollars and shall not exceed five hundred dollars, exclusive of interest, and shall have concurrent jurisdiction with the district court of said county when the matter in controversy shall exceed five hundred dollars and not exceed one thousand dollars.

§2. APPELLATE JURISDICTION. Said county court shall have appellate jurisdiction in civil cases over which justices' courts have original jurisdiction when the judgment of the court appealed from or the amount in controversy shall exceed twenty dollars, and said county court shall have power to hear and determine cases brought up from a justice's court by *certiorari* under the provisions of the title of the Revised Civil Statutes relating thereto.

§3. GRANT WRITS. The county judge in said county shall have authority, either in term time or in vacation, to grant writs [of] *mandamus*, injunction, sequestration, garnishment, attachment, *certiorari*, *supersedeas*, and all other writs necessary to the enforcement of the jurisdiction of said court, and shall also have power to issue writs of *habeas corpus* in all cases in which the constitution has not exclusively conferred to [the] power on the district court or judge thereof.

§4. BONDS IN CRIMINAL CASES. Said county court shall have jurisdiction in the forfeiture and judgment of all bonds and recognizance taken in criminal cases of which criminal cases said court has jurisdiction.

§5. MISDEMEANOR CASES. Said county court shall have exclusive original jurisdiction of all misdemeanors, except misdemeanors involving official misconduct, and except cases in which the highest penalty of fine that may be imposed under the law may not exceed two hundred dollars, and said courts shall have also appellate jurisdiction in criminal cases of which justices of the peace and other inferior tribunals of said counties have original jurisdiction.

§6. RESTRICTION OF DISTRICT COURT. The district court of Wilson county shall no longer have jurisdiction in cases in which the county court of said county by the provisions of this act have exclusive original or appellate jurisdiction, and it shall be the duty of the clerk of the district court of said county, within thirty days from the passage of this act, to make a full and complete transcript of all orders on its dockets in cases now pending before said district court of which cases by the terms of this act exclusive jurisdiction is given to the county court, and to deliver said transcripts, together with the original papers and certified bill of costs, to the clerk of said county court, and said county clerk shall enter said case or cases on their dockets for trial by said county courts.

§7. COUNTY COURT. The county court of said county shall hereafter hold its regular term for civil or criminal business as provided in the constitution and general laws of the state, and process heretofore issued from the district court of said county in cases to be transferred under this act to the county court shall be returnable to the first term of the county court, and all civil cases transferred shall be entered as appearance cases upon the docket of said county court.

§8. SAME. The county court of said Wilson county shall have as now the general jurisdiction of probate courts for the probate of wills, appointment of guardians of minors, idiots, and lunatics, persons *non compos mentis*, and common drunkards, and for the issuance of letters testamentary and administration, settlement of accounts of administrators and guardians, and the settlement and distribution of decedents' estates, and the apprenticeship of minors, and all other necessary powers conferred by law on courts of probate.

§9. REPEAL. All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed, and that this act take effect and be in force from and after its passage, and it is so enacted. [Act March 16, 1889; 21 Leg. p. 41.]

ARTS. 1172o, 1172z. Jurisdiction restored to county courts of Greer and Donley.

§1. All the civil and criminal jurisdiction taken from the county court of Greer by an act of the Twentieth Legislature, approved

**T. 28, CH. 4.]**

**COURTS, COUNTY.**

**Arts. 1172o, 1172z.**

March 26th, 1887, and all civil and criminal jurisdiction taken from the county court of Donley by act of the Eighteenth Legislature, approved March 16th, 1883, be, and the same is hereby, restored.

§2. **CONFLICTING LAWS REPEALED.** All laws and parts of laws in conflict with this act are hereby repealed. [Act March 21, 1889; 21 Leg. p. 48.]

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**CH. 4.—THE TERMS OF THE COUNTY COURT FOR CIVIL  
AND PROBATE BUSINESS.**

**ARTS. 1173, 1174. See Civil Statutes.**

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**CH. 5.—MISCELLANEOUS PROVISIONS RELATING TO  
THE COUNTY COURT.**

**ARTS. 1175 to 1180. See Civil Statutes.**

## TITLE 29.—COURTS, DISTRICT AND COUNTY; PRACTICE IN.

### CH. 1.—INSTITUTION OF SUITS.

ART.  
1181 to 1183. See Civil Statutes.

ART.  
1184. Suit may be commenced, when.  
*Annotated.*

ART. 1184. Suit may be commenced, when.

(2.) A defendant who enters his appearance, and answers to the merits in a suit begun on a legal hol day, before excepting on account of the suit being thus instituted, thereby waives the question of jurisdiction. The objection to a suit thus brought may also be cured by an amended original petition filed before the defendant's exceptions. *Williams & Co. v. Verne*, 68 T. 414.

### CH. 2.—PLEADINGS IN GENERAL.

ART.  
1185, 1186. See Civil Statutes.  
1187. Statement in pleading, how made. *Annotated.*  
1188. Intervenor's pleadings, form of. *Annotated.*  
1189. See Civil Statutes.

ART.  
1190. Charter and acts of incorporation, pleaded how. *Annotated.*  
1191. Private and special laws, pleaded how. *Annotated.*  
1192. Amendment of pleadings. *Amendment and annotated.*  
1193, 1194. See Civil Statutes.

ART. 1187. Statements in pleadings, how made.

(1.) Pleadings should state facts, and when the plea contains averments of legal conclusions predicated by the pleader on such facts, and not necessary to the full presentation of the right claimed, they should on motion be stricken out. *Morrison v. Insurance Co.*, 69 T. 353.

(4.) In a suit involving the ownership of property, its ownership may be alleged in general terms. The facts which constitute a cause of action are matters of evidence, not of pleading. *Rains v. Herring*, 68 T. 468.

In the petition it was charged that the personal injury was caused at a public crossing by the negligence of the railway company, etc., in not keeping a safe crossing over its track at the public crossing, defects in the bridge, and in the position of a hand car and pile of ties being given as particulars, etc. The testimony showed that the crossing was good and tended to show that the team driven by deceased took fright at the hand car and pile of ties at the crossing and ran a distance of one hundred to one hundred and fifty yards before deceased was thrown from the wagon. *Held*, no variance existed between the petition and testimony.

In action for damages from gross negligence of the servants and employes of a railway company, it devolves upon the plaintiff, in order to recover, to establish such degree or character of negligence, and it is error in the court to refuse to instruct the jury that unless gross neglect, defining it, be established, the plaintiff cannot recover. *Railway v. Hill*, 71 T. 451.

(5.) A petition in a suit to recover on a promissory note which contains no averment as to the time when the note was due, but which contains the general allegation that the note "remains still due and unpaid," being formal in other respects, is good on general demurrer. *Pennington v. Schwartz*, 70 T. 211.

(7.) When from an inspection of an entire plea it is manifest that a wrong name has been written through mistake, and it is obvious what name was intended, without looking beyond the plea itself, the error is immaterial. *Fears v. Albea*, 69 T. 437.

(8.) In the petition it was alleged that the bond sued on was for six thousand dollars. A copy of the bond was attached to the petition as an exhibit, and is it the amount of the bond was six thousand five hundred dollars. Objection to the bond for variance with the petition was properly overruled, the exhibit being a copy of the original, the defendants could not have been misled or surprised. *Mast v. Nacogdoches Co.*, 71 T. 380.

(9.) In the absence of a statement of facts, where damages are alleged for fraudulent representations, entitling plaintiff to recover, though no interest is claimed in the petition, it will be presumed that the necessary proof was made, and the verdict of the jury calling for interest, when damages is meant, or when interest is given as damages, is not cause for the reversal of the judgment. [*Close v. Fields*, 13 T. 627; *Calvit v. McFadden*, *id.* 325; *Fowler v. Davenport*, 21 T. 634; *Anderson v. Duffield*, 8 T. 237.] *Bradford v. Mann*, 1 U. C. 226.

That the sale of a stock of cattle was for a valuable consideration, without stating the price in dollars, is a sufficient allegation to admit proof; if the defendant needs a more specific allegation of the amount, he should except to the sufficiency of the petition, and if he fails to do so, his objection, if the petition could be held defective on that account, will be considered waived, and is cured by verdict. [*DeWitt v. Miller*, 9 T. 245; *Ch. Pl. 712.*] *Bradford v. Mann*, 1 U. C. 226.

(10.) Though a petition may contain a more detailed statement of the facts on which a recovery is sought than may be required to present properly the cause of action, yet, when the purpose is to indicate thereby particularly the scope of the evidence which will be relied on at the trial, and no injury can result to the adversary from their statement, it is not bad on demurrer. *Railway v. Pool*, 70 T. 713.

(21.) The petition alleges acts of negligence on part of the defendant at the time of the collision; that without negligence on the part of the deceased he was struck by the passing train and killed; and that the death was caused by the negligence of defendant. These allegations give a cause of action. *Railway v. Lee*, 70 T. 496.

A plaintiff seeking to recover from a railway company damages for injuries sustained by him, on account of the alleged failure of the defendant company to keep in repair a good, safe and substantial crossing over its road track, is not required to allege with specific particularity the character of the defects in such crossing. A general allegation in the petition of the insufficiency of the crossing, that it had not been properly prepared, fixed or kept in repair, and that it was rotten and otherwise defective and insufficient, puts the defendant in notice of the case he is required to meet. *Railway v. Brinker*, 68 T. 500.

In a suit for damages resulting from the negligence of defendant, the petition need not negative by distinct averments the contributory negligence of the plaintiff, unless the allegations made would show *prima facie* that he was negligent. *Railway Co. v. Redeker*, 67 T. 181.

In a suit for damages for breach of warranty, plaintiff alleged the purchase of the right-of-way and depot grounds from the defendants; that they executed a warranty deed therefor, and the right thereto has failed; *held* sufficient to support a judgment. *Ackerman v. Huff*, 71 T. 317.

Judgment upon a money claim against the ancestor should not be rendered against heirs, unless it is alleged that they received assets from the ancestor. *Schmidtke v. Miller*, 71 T. 103.

A petition in a suit for a legacy against one alleged to be an executrix, which fails to allege that the defendant had qualified as such executrix; or whether the estate was in due course of administration in the county court; or in what capacity the defendant took possession of the property of the estate, except by referring to articles in *Paschal's Digest*; and where personal judgment against the executrix was claimed, failure to allege any fact or circumstance authorizing a personal judgment against her is insufficient, and overruling a demurrer filed thereto was error. *Hawkins v. Forrest*, 1 U. C. 167.

A promise to pay a designated sum for the arrest of two persons will not support an action for the arrest of one only. *Blain v. Express Co.*, 69 T. 74.

(35.) In a suit against the sureties on a treasurer's bond it appeared from the petition that the treasurer properly disbursed more money after the bond was executed than came into his hands after that date. The petition further showed that more money than was claimed in the action came into the treasurer's hands prior to the execution of the bond. *Held:*

1. Unless the petition clearly alleged that the money received by the treasurer prior to the execution of the bond was in his hands at the time of its execution, it was subject to demurrer.

2. See opinion for allegations held insufficient. *Barry v. Screwmen's Association*, 67 T. 250.

(27.) When an exhibit is referred to in pleading, and its inspection shows facts contradictory of the allegations in the plea, in considering the plea on demurrer, the exhibit, and not the allegations found in the plea, must control. *Freiberg et al. v. Magale*, 70 T. 116.

(28.) Exemplary damages can be awarded only as a punishment when the injury inflicted was the result of the fraud, malice, gross negligence or oppression of the defendant. When such damages are claimed, the petition should set forth the acts or omissions which constituted such fraud, malice, gross negligence or oppression. When the defendant is a corporation it should be alleged and proved that the acts of the corporation servant, which constitute the fraud, malice, gross negligence or oppression were committed by direction of the employer, or that the corporation, through its proper agents, ratified and adopted such acts as its own. *Railway v. Gracia*, 70 T. 207.

A petition in a suit to recover damages alleged generally that the plaintiff was damaged in a designated sum, and afterwards claimed a different sum as punitive damages, and a designated sum as actual damages; the general claim for damages should have been stricken out on exception. *McAllen v. Telegraph Co.*, 70 T. 243.

#### ART. 1188. Intervenor's pleadings, form of.

(5.) When on a trial the specific equitable relief prayed for in the pleadings of the successful party is authorized and required under the facts as found, it is error to disregard the prayer and enter a decree not prayed for. Hence, if in proceedings by attachment an intervenor attacks the claim of the original plaintiff for fraud, and prays that the proceeds of the attached property may be applied to the satisfaction of his own claim, and to that of subsequent attaching creditors according to the priority of their liens, and on the trial the claim of the plaintiff is adjudged fraudulent, it is error to decree payment to the plaintiff of such funds as may remain after discharging the debt due the intervenor, in disregard of other attaching creditors; and this, though such other attaching creditors have not been made parties. In such a case, before entering the final decree, all the attaching creditors should be made parties. When the determination of priority of liens is involved, all claiming liens, who are interested in the distribution of the fund, are necessary parties. *Cook v. Pollard*, 70 T. 723.

(8.) An intervenor, by making himself a party to secure his interest in property involved in litigation between a plaintiff and defendant, in making defense of his own right can plead and prove anything which will be a defense to the plaintiff's case, so far as it might affect his (intervenor's) own claim. He does not, however, become the protector of the defendant, nor can the defendant derive any aid in his own case beyond what may be brought into it supported by his own defense, as made in his answer.

If the defendant's pleadings do not admit of evidence of payment or satisfaction of the note sued on, he cannot defend or receive the benefit of such defense made by the intervenor, but the intervenor's rights cannot be injured by the defendant's conduct of his own defense; and a plea by the intervenor that the defendant had, "on November 1st, 1874, fully accounted with the plaintiff, and settled and fully discharged the note on which plaintiff brings this suit to the full satisfaction of plaintiff, and any cause of action or right or lien that may ever have existed between plaintiff and defendant, by and under said note," was sufficient to admit evidence of satisfaction, and sustaining exceptions thereto was erroneous. *Brown v. Mitchell*, 1 U. C. 373.

(10.) A receiver of an insolvent corporation may reconvene against one who intervenes in a proceeding to which he is a party, and ask an adjudication of all the

rights of the corporation growing out of a continued course of business with the intervenor under one general agreement. The fact that other suits were pending in another jurisdiction involving some of the matters in dispute, and to which the receiver was a party, when pleaded in abatement to the plea in reconvention, is not an answer to it. *Bank v. Weems*, 69 T. 489.

**ART. 1190. Charter and act of incorporation, pleaded how.**

When a corporation is the defendant in a suit, the statute does not require that the charter should be set forth, or that it should be alleged by what authority the defendant was incorporated. *Water Works v. Kennedy*, 70 T. 233.

**ART. 1191. Private and special laws, pleaded how.**

(1.) It is not necessary to set out in pleading a private act of the Legislature, but it is sufficient to recite the title thereof and the date of its approval, and to set forth in substance so much of the act as may be pertinent to the cause of action or defense. The object of this rule is to relieve the pleader from the necessity of setting forth either the act or any of its provisions in full, and to give him, his adversary and the court as fully the benefit of the full contents of the act as if it formed a part of the pleading. Hence, on demurrer when an act is thus referred to, the court may look to its contents. *Railway v. Rushing*, 69 T. 306.

**ART. 1192. Amendment of pleadings; intervention.**

All parties to a suit may, in vacation, amend their pleadings, may file suggestions of death and make representative parties, and make new parties, and file such other pleas with the clerk of the court in which such suit is pending as they may desire. And any party may, in vacation, intervene in any suit pending such amendments and pleas, subject to be stricken out at the next term of the court on motion of the opposite party to the suit for sufficient cause shown or existing, to be determined by the court; *provided*, that it shall be the duty of the party filing such pleading to notify the opposite party or their attorneys of the filing of such papers within five days from the filing of the same. All amendments to pleadings, pleas, and pleas of intervention, must, when court is in session, be filed under leave of the court, upon such terms as the court may prescribe, before the parties announce ready for trial, and not thereafter. [Amendment March 6; July 6, 1889; 21 Leg. p. 9.]

(3.) After an announcement by both parties to a cause of ready for trial, the court is not, as a matter of right, required to allow amendments to pleading when requested. *Harris et al. v. Spence*, 70 T. 616.

The statute which permits the pleadings filed in a cause to be amended before the parties have announced themselves ready for trial, and not afterwards, is directory. The court may, in the exercise of a sound discretion, permit an amendment after an announcement of ready for trial by the parties.

In the absence of an affidavit made by a party who seeks the continuance of a case on account of surprise, when his adversary has been permitted to file an amended pleading, after both parties have announced themselves ready for trial, the action of the court in refusing the continuance will not be revised, unless it shall be apparent from an inspection of the record that the party seeking the continuance could not have been prepared for trial because of the amendment.

[This case distinguished from *Cowan v. Williams*, 49 T. 880.] *Railway Company v. Goldberg*, 68 T. 685.

A judgment will not be reversed on account of the refusal of the trial court to permit a plea to be entered or amended after the close of the argument on the trial. Pleadings may be amended on such terms as the court may impose before the parties announce themselves ready for trial, and not thereafter. *Heflin v. Burns*, 70 T. 347.

(5.) A suit was filed in the name of "F. A. Rabb, a minor, by his guardian, G. A. Rabb." The petition was amended in the name of "G. A. Rabb, guardian of Frank Rabb," suing for the benefit of his ward; each petition was for the benefit of the ward alone. *Held*, that the amendment did not make a new party plaintiff, and that the guardian was in effect the party plaintiff in each petition. *Rabb v. Rogers et al.*, 67 T. 335.

Where a mistake in the mode of pleading the plaintiff's case, as to the form in which the allegations shall appear of record, is susceptible of amendment, the amendment relates back to the filing of the original petition, and is not a setting up of a new cause of action against which the statute of limitation would run to the time of filing such amendment. [*Connolly v. Hammond*, 51 T. 647; *Killebrew v. Stockdale*, 51 T. 531; *Tarkinton v. Broussard*, *id.* 554; *Scoby v. Sweatt*, 28 T. 529; *Becton v. Alexander*, 27 T. 659; *Thouvenin v. Lea*, 26 T. 614; *Wells v. Fairbanks*, 5 T. 582.] *Ripeto v. Dwyer*, 1 U. C. 493.

When the cause of action is an injury resulting from the alleged negligence of the defendant, the time, place and circumstances of which are stated in the original petition, which is filed before limitation has barred the action, limitation cannot be pleaded to an amendment which states more fully than the original petition the results of the injury, and which is filed at a time when the statute would bar a recovery on a suit then brought. *Railway Co. v. Davidson*, 68 T. 370.

(7.) It is complained that the court erred in overruling plaintiff's exceptions to defendant's last amended original answer. The ground of the exception here relied upon is that the answer did not show that it was filed as a substitute for the previous answers. The answer was not in compliance with the rules, and the court should have sustained the exception. When plaintiff filed his amended original petition, if defendant was not content to rely upon his answer already filed, he should have repleaded such of his former allegations as he did not wish to abandon, and should have added any new matter he desired to set up. But the record fails to disclose that appellant has been prejudiced by the erroneous ruling of the court. This error is, therefore, harmless, and is not a ground for a reversal of the judgment. *Richie v. Levy*, 69 T. 133.

### CH. 3.—PLEADINGS OF THE PLAINTIFF.

#### ART.

1195. Petition, requisites of. *Annotated.*

#### ART.

1196, 1197. See Civil Statutes.

#### ART. 1195. Petition, requisites of.

(11.) A judgment, determining the extent of the interests of defendants as between themselves, which is not prayed for by the pleadings, cannot be rendered. *O'Leary v. Durant*, 70 T. 409.

Facts not alleged, though proved, cannot form the basis of a decree; and where a plaintiff does not pray for judgment, or ask any relief, it is improper to render any judgment in his favor. [*Hall v. Jackson*, 3 Tex. 305; *Chrisman v. Miller*, 15 Tex. 159; *Hobby v. Campbell*, 22 Tex. 582; *Mann v. Falcon*, 25 Tex. 276.] *Perkins v. Forrest*, 1 U. C. 167.

### CH. 4.—VENUE OF SUITS.

#### ART.

1198. Venue of suits. *Amendment and annotated.*

#### ART.

1199, 1199a. See Civil Statutes.

#### ART. 1198, §3. Residence without the state or unknown.

(3.) In a case where the proper venue depended on the residence of the defendant, it was found that he had gone from the county in which he had first



lived to another county, and had there engaged in business, taking with him all his movable property; that he had sold his house and given possession, but had returned, and was only prevented from removing his family by sickness, and it was notorious that he had removed from the county of his former residence; *held*, that when it is uncertain in which of the two counties a defendant has his residence, he may be sued in either. In this case he could not properly be sued in the county where he first resided. *Faires v. Young*, 69 T. 482.

#### §4. Residence in different counties.

(1.) Construing this subdivision, *held*, that the defendant who resides in the county where the suit is brought must be either a necessary or proper party defendant; if he is neither a necessary or proper party, a plea to the jurisdiction filed by non-residents of the county joined with him in the action should be sustained.

When such a plea is interposed by one of several who are joined as defendants in a suit to recover damages for a tort, brought in a county where he does not reside, and there is evidence tending to establish the fact that the defendant who resides at the venue of the cause is not liable, it is error not to present in a charge to the jury the issue thus arising on the plea to the jurisdiction. *Railway Co. v. Mangum*, 68 T. 342.

#### §8a. In case of wrongful levy of attachment.

Any suit for damages growing out of the suing out of any writ of attachment or sequestration, or for the levy of any such writ, may be brought in any county from which such writ was issued, or in any county where such levy was made, in whole or in part, within this state. [Amendment March 29; July 6, 1889; 21 Leg. p. 48.]

#### §13. Suits concerning land.

(1.) An action by tenants in common in two tracts of land located under one land certificate, but in different counties, and against heirs of the grantee of the certificate, in trespass to try title, can be maintained for both tracts, there being no plea in the abatement nor special exceptions as to the tract of land lying in the county other than that in which suit is brought. [67 T. 382, *Martin v. Robinson*; 11 T. 400, *Ryan v. Jackson*; Sec. 13, Rev. Stats., 1198.] *Tevis v. Armstrong et al.*, 71 T. 59.

(4.) In a suit to remove cloud from title, brought in a county within which none of the land is situated, a plea in abatement filed in proper time and manner objecting to the venue should be sustained. *Russell v. Railway Company*, 68 T. 646.

The statute which determines the venue of suits against railway companies, makes no distinction as to the character of actions, as it does where a natural person is defendant, and a suit against a railway company for an injury done to one's land and grass by fire caused by negligence of the company, may be maintained not only in the county in which the cause of action arose, but in any county through or into which the company operates its road, or in which it has an agency, or in which its principal office is situate. *Railway v. Horne*, 69 T. 643.

#### §15. Injunction to stay execution.

(2.) *Scire facias* to revive a judgment is a continuation of the same suit and the jurisdiction is where the original judgment was rendered, regardless of the residence of the defendants.

Upon a defendant dying in a proceeding to revive a money judgment, the legal representatives are necessary parties, and the heirs are only proper parties in such suit where there is shown to be no administration, nor need of one.

Where there is an administration or a necessity for one, a money judgment must be enforced through the probate court. Where heirs are proper parties, judgment can be rendered against them, not exceeding assets received. *Schmidtke v. Miller*, 71 T. 103.

## CH. 5.—PARTIES TO SUITS.

## ART.

1200. Suits against counties, cities, etc. *Annotated.*1201. Suits by executors, etc. *Annotated.*1202. Suits for land against decedents. *Annotated.*

1203. See Civil Statutes.

## ART.

1204. Suits for wife's separate property. *Annotated.*

1205 to 1210. See Civil Statutes.

1211. Guardian *ad litem* for minors. *Annotated.*

1212. See Civil Statutes.

## ART. 1200. Suits against counties, cities, etc.

(7.) When, by agreement between tenants in common, one has the exclusive use and possession of a part of the common property, while the other has like use of other lands thus owned, either may recover for an injury done to the property to which he has right of such exclusive use or occupation. *G. C. & S. F. Ry. v. Wheat*, 68 T. 133.

While all tenants in common should join as plaintiffs in an action for trespass, still a defendant can, and should, by instructions asked, protect himself upon the trial and have damages apportioned, and require the verdict to be limited to the proportional interest held by the plaintiffs. [66 T. 533.] *Lee v. Turner*, 71 T. 264.

(15.) One leasing land so as to give right of action to an adjoining owner is liable, whether he owns the land so leased or acts as agent in the leasing. *Lee v. Turner*, 71 T. 264.

(16.) The plaintiff in execution is a necessary party to a suit against a sheriff to enjoin the sale of property levied on under execution. *Ryburn v. Getzen-dauer*, 1 U. C. 349.

In a suit to recover land fraudulently conveyed by trustees, it is not error to join the trustees as defendants with the last vendee, with a prayer for cancellation of the conveyances made. If the plaintiff failed to recover the land by reason of want of notice of the fraud on the part of the purchaser, she was entitled to recover of the constructive trustee her interest in the purchase money paid to him. The fact that the petition showed no ground for recovering a moneyed judgment against the trustees afforded no reason for dismissing the suit. *Everett v. Henry et al.*, 67 T. 402.

As a general rule the *cestui que trust* is a necessary party in all suits brought by or against the trustee to recover the trust property. The exceptions to this general rule apply chiefly to cases where there are a great number of beneficiaries in the trust, and where the intention existed in creating the trust to invest the trustee with power to prosecute and defend suits in his own name.

The fact that the trustee is authorized by the instrument evidencing the trust, to receive rents for the use of the *cestui que trust*, and in his discretion to sell the property and apply the proceeds to the benefit of the *cestui que trust*, will not authorize the trustee to defend alone a suit brought to cancel the instrument creating the trust. The beneficiary is a necessary party. *Ebell v. Bursinger*, 70 T. 120.

It is not error to join in the same suit claims for property converted, and for damages proximately resulting from a breach of contract, when the matters relied on for a recovery are connected with and grew out of the same cause of action and subject matter in dispute; in such an action it is proper to join all the parties as plaintiffs or defendants, who have so participated in the transaction as to render them interested in the determination of the suit. *Milliken v. Callahan Co.*, 69 T. 205.

(18.) When, in a suit to set aside an execution sale on account of the fraud of the purchaser, there are no equities to adjust between the judgment creditors and the purchaser, no complaint being made as to the validity of the judgment and execution, the creditor is not a necessary party, and when the relief is sought against the original purchaser, through whose fraud the sale was consummated, the proceeding is not collateral in its character. *Stone v. Day*, 69 T. 13.

(19.) All parties having an interest in land on which the foreclosure of a vendor's lien is sought, are necessary parties. *Thompson v. Griffin*, 69 T. 139.

A purchaser in possession from the vendee before suit to foreclose the vendor's lien is a necessary party to such suit.

A decree foreclosing the vendor's lien does not affect the rights of a purchaser from the vendee in possession and not a party to the suit.

A vendee sold part of a tract of land on which the vendor's lien remained. In a suit to foreclose the lien with the proper parties, the court can protect the purchaser from the vendee by adjusting the equities between him and those claiming by purchase under him. *Ballard v. Carver*, 71 T. 161.

In a suit to foreclose a mortgage against parties, each of whom claims in his own right and holds possession of a portion of the mortgaged property, all may be joined as defendants. If the mortgaged property, after sequestration, be replevied by the defendants jointly, a joint judgment may be rendered against all; their joint liability resulting from their bond. *Boykin v. Rosenfield & Co.*, 69 T. 115.

One who purchases an equity of redemption at sheriff's sale, before a mortgage creditor brings his suit to foreclosure, and who is not made a party to the foreclosure suit, is not affected by it. Having purchased the equity of redemption, which, in Texas, is equivalent to the fee, he acquires title as against the purchaser under foreclosure decree in the suit to which he was not a party. *Railway Company v. Whitaker*, 68 T. 630.

(19a.) The mortgagor sold corn subject to his mortgage. Suit was prosecuted to judgment by mortgagee against the mortgagor. The corn was used by the purchaser. The mortgagee brought suit against the purchaser for the value of the corn, it being less than the amount secured by the mortgage. *Held*, 1. The suit against the mortgagor, without making the purchaser a party, was not an abandonment of the lien. 2. That the mortgagor was not a necessary party in suit by mortgagee against the purchaser. 3. The purchaser was responsible; the measure being the value of the corn subject to the lien which he had used. *Boydston v. Morris*, 71 T. 698.

(23.) When it is apparent from an inspection of the record that no injury has resulted from the final judgment in a cause from the action of the court in overruling a plea in abatement setting up a misjoinder of parties or of causes of action, the action of the court on the plea becomes immaterial, and can afford no ground for reversal. *Thompson v. Griffin*, 69 T. 139.

(24.) The want of necessary parties to an action may be urged after judgment by default has been entered against those who have been made parties. [*Anderson v. Chandler*, 18 T. 436, followed.] *Ebell v. Bursinger*, 70 T. 120.

An administrator transferred a note belonging to the estate in payment of a debt due from himself. The maker of the note afterwards executed to the holder a new note payable to him in lieu of the note thus transferred, which he paid. In a suit against the former administrator, by the administrator *de bonis non*, to recover the proceeds of the note thus fraudulently transferred, *held*, that in such a suit brought for the wrongful conversion of property against the former administrator, neither the sureties on his official bond nor the maker of the original note were necessary parties defendant. *Williams & Co. v. Verne*, 63 T. 414.

While the rule that all parties in interest ought to be made parties is well established, so also are the exceptions to it; and where parties interested in the subject matter of a suit are very numerous, some of them may maintain a suit for themselves and others interested in like manner. [*Story's Equity Pl.* 94, 97, 114.] *Carleton v. Roberts*, 1 U. C. 587.

#### ART. 1201. Suits by executors, etc.

(1.) However inconsistent or repugnant the allegations may be in the pleadings of heirs who have been made parties in a suit by the administrator of their ancestor, they will not have the effect of annulling what the administrator has sufficiently alleged. [*Smith v. McGaughey*, 13 T. 464.] *Walton v. Talbot*, 1 U. C. 511.

(2.) Pending an administration, heirs cannot sue, save where it is shown to be necessary for their protection. *Lee v. Turner*, 71 T. 264.

(3.) Though an executor or administrator may maintain a suit to remove cloud from title to land owned by the heir without joining the heir as a party, the judgment rendered will conclude the heir in the absence of fraud and collusion. This is by virtue of the statute. The statute is equally explicit in requiring that

the heir shall be made a party defendant to any suit brought against the estate involving title. (*Post*, Art. 1202.) *Russell v. Railway Company*, 63 T. 646.

**ART. 1202. Suits for land against decedents.**

(2.) Construing section 118 of the act of May 13th, 1846 (Early Laws, Art. 175, §21; Art. 3484, §229), Revised Statutes, final title, section 5; Revised Statutes, articles 1202, 1943; *held*, that this article applies to suits in which the title of the estate to land is brought in controversy, and not to such as merely seek to enforce a lien upon it. The heirs are not necessary parties to a suit brought against an independent executor by a lien creditor to enforce his lien against the land of the estate. *Howard v. Johnson*, 69 T. 655.

**ART. 1204. Wife's separate property.**

(1.) In a suit for damages to the wife's separate property, while she is not a proper party plaintiff, yet the joinder of the husband and wife as plaintiffs is not reversible error. *Lee v. Turner*, 71 T. 264.

The husband is the proper party plaintiff in an action for personal injury to the wife.

A husband's mental suffering caused by his wife's condition, could not be shown to increase the amount of damages. The direct injury is to the wife, and a second recovery for the husband's anxiety occasioned by her suffering cannot be allowed. *Telegraph Co. v. Cooper*, 71 T. 508.

(5.) The wife is a proper party to a suit to foreclose the vendor's lien on a note, given by her husband for land deeded to her, and may properly be included in the decree of foreclosure, but it is error to render judgment against her for the debt, or for costs. *Linn v. Willis*, 1 U. C. 153; *Garner v. Butcher*, 1 U. C. 430.

**ART. 1211. Guardian ad litem.**

(1.) When a court has acquired jurisdiction over the persons of minor defendants, though a judgment rendered against them when no guardian *ad litem* has been appointed to represent them, would not be void, yet a due administration of justice would require its reversal on appeal. *Ashe v. Young*, 68 T. 123.

(3.) If minors have lawful guardians, they should be made parties to suits in which minors are interested; if not, or the guardians are interested adversely to the minors, special guardians must be appointed. [*Pas. Dig.*, 6968, 6973; *Pucket v. Johnson*, 45 T. 550; *Ins. Co. v. Ray*, 50 T. 511; *Bond v. Dillard*, *id.*, 300; *post*, Art. 1311.] *Hawkins v. Forrest*, 1 U. C. 167.

**ART. 1212. Attorney for absent defendants.**

(1.) An attorney appointed by the court cannot represent conflicting interests of parties for whom he acts as such. *O'Leary v. Durant*, 70 T. 409.

## CH. 6.—PROCESS AND RETURNS.

**ART.**

1213, 1214. See Civil Statutes.

1215. Citation shall contain, *what*.  
*Annotated.*

1216 to 1218. See Civil Statutes.

1219. Service within the county. *An-*  
*notated.*

1220 to 1226. See Civil Statutes.

**ART.**

1227. Alias process. *Annotated.*

1228 to 1235. See Civil Statutes.

1236. For unknown heirs. *Annotated.*

1237 to 1242. See Civil Statutes.

1243. Motion constitutes appearance,  
*when*. *Annotated.*

1244, 1245. See Civil Statutes.

**ART. 1215. Citation shall contain, what.**

(1.) A citation which fails to state the names of all of the defendants is defective, and will not support a judgment by default. [42 T. 52; 8 T. 108; 16 T. 46; 25 T. 583.] *Owsley v. Paris Exchange Bank*, 1 U. C. 93.

(4.) Where a defendant was served on the 24th of June, 1876, with citation to appear at a term of the district court of San Saba county, to be held on the fourth Monday after the first Monday in September, 1876, and on the 29th day of July, 1876, the time of holding court in that county was changed, by act of the Legislature, to the second Monday in September, 1876, to render judgment against him

by default September 11th, 1876, at a term of court held under the law as changed was erroneous. [Gen. Laws, 15th Leg. ch. 67, p. 73; Pas. Dig., art. 1513; *id.* 1413 Neill v. Brown, 11 T. 17.] Bagley v. Spruill, 1 U. C. 277.

**ART. 1219. Service of citation within the county.**

(1.) A defendant sued as executor, and also individually, need not be served with more than one copy of the citation. *Owsley v. Paris Exchange Bank*, 1 U. C. 93.

**ART. 1227. Alias process.**

When the suit is against several who are described in the petition as residents of another county, but temporarily in the county where the suit is brought, and in which another defendant resides, if there be no service, a supplemental petition is not requisite to authorize an alias citation to the county of the residence of the defendants. When service is made on the party outside of the county in which the suit is pending, it is the duty of the officer to deliver to him a certified copy of the petition, whether the writ so commands or not. *Crawford v. Wilcox*, 68 T. 109.

**ART. 1230. Notice to defendant without the state.**

(2.) Even admitting that a defendant to a suit instituted in Texas cannot be brought into court under citation served in another state, yet if he appears and moves to quash the service of the writ, he thereby impliedly waives all other objections to the writ not then urged. If the motion be sustained, its effect is only to abate the writ; it does not operate a dismissal of the suit, and the plaintiff may have service of citation within the state if the defendant can be reached.

When a citation or service thereof is quashed on motion of defendants, the case may be continued for the term; but the defendant will be deemed to have entered his appearance at the succeeding term of the court. If the motion to quash is not acted on during the term, but is passed to another term without action, the defendant will be treated as having appeared at the next term.

The consequences as to service by notice being the same under the statute as service by citation, the effects of a motion to quash the two species of process must be the same as to constructive appearance at the term following. This held without deciding that an appearance by a non-resident of Texas for the purpose of objecting to the right of a Texas state court to bring him within its jurisdiction by notice served without the state, can so bring him within the jurisdiction of the state as to require him to answer at the succeeding term. *Feibleman v. Edmonds*, 69 T. 334.

**ART. 1236. For unknown heirs.**

(1.) A sheriff's return to a citation by publication to unknown heirs, which states the date when the writ was received, and that he caused it to be published in a newspaper (naming it) which was published in the county of the venue "for eight weeks successively," without showing when it was executed, is not in compliance with the statute. If eight weeks did not elapse between the date of the issuance of the citation and the beginning of the term at which the writ was returned, such return would not affect its validity as citation to the succeeding term. *O'Leary v. Durant*, 70 T. 409.

**ART. 1243. Motion is appearance, when.**

(2.) A motion operates as an appearance whether it is sustained or not. *Railway v. Morris*, 68 T. 49.

## CH. 7.—ABATEMENT AND DISCONTINUANCE OF SUIT.

**ART.**

1246. Suit not to abate where plaintiff dies, etc. *Annotated.*  
1247. See Civil Statutes.

**ART.**

1248. Death of defendant. *Annotated.*  
1249 to 1261. See Civil Statutes.

**ART. 1246. Death of plaintiff not to abate suit.**

(3.) After the death of the plaintiff in an action of trespass to try title, and before his heirs or legal representatives were made parties, the suit was dismissed, *held*, that such order was voidable against his heirs, etc., upon a motion or pro-

ceeding to reinstate the case within a reasonable time after such dismissal.

*Armstrong v. Nixon*, 16 T. 610, limited so far as the opinion declares such order void. Other cases on the subject followed. [*Weaver v. Shaw*, 5 T. 286; *Milam County v. Robertson*, 47 T. 222; *Giddings v. Steele*, 28 T. 756, and *Taylor v. Snow*, 47 T. 464.] *Harrison v. McMurray*, 71 T. 122.

#### ART. 1248. Death of defendant.

Upon the dissolution of a private corporation all actions at law against it abate.

The statutes of this state do not provide for the further prosecution of an action at law against a foreign corporation after its dissolution, against its legal representative.

It would seem that a suit at equity abated by such dissolution might be revived.

Limitation will run against a bill of revivor to make proper parties, such existing, who represented the defunct corporation, and who could be made parties.

A plaintiff alleging fraud is chargeable with notice of such charge thereafter so as to prevent a suspension of limitation against him by reason of such fraud.

From November, 1879, until May, 1885, was sufficient to bar a bill of revivor against the representative of a foreign corporation, after allowing all reasonable time after such dissolution to make parties before the statute of limitations should be allowed to run.

A proceeding to subject lands in Texas to the debts of a foreign defunct corporation must be brought within the time allowed by the statutes of limitation. *Life Association v. Goode*, 71 T. 92.

## CH. 8.—PLEADINGS OF THE DEFENDANT.

#### ART.

1262. Answer may include several matters. *Annotated.*

1263, 1264. See Civil Statutes.

1265. Certain pleas to be verified by affidavit. *Annotated.*

#### ART.

1266 to 1268. See Civil Statutes.

1269. Certain pleas to be determined during the term at which filed. *Annotated.*

#### ART. 1262. Answer may include several matters.

(1.) A plea in abatement, filed after an answer to the merits, should be disregarded. *Graham v. McCarty*, 69 T. 323.

A plea in abatement was filed after plea to the merits—attention of the court was not called to it until after the testimony to the merits had closed, when a charge was asked upon the plea; *held*, that it will be considered that the plea was waived. *Howard v. Britton & Co.*, 71 T. 286.

Defendant having pleaded the truth of the matter charged to be libelous, and also a general denial, it was error to allow plaintiff to read in evidence from the plea so much as alleged the truth of the publications, for purpose of showing motive. Such admission is inconsistent with the statutory right to file inconsistent defenses. [Rev. Stats., 1262.] *Young v. Kuhn*, 71 T. p. 645.

(16.) In a suit by one claiming to act as administrator in its institution the representative capacity of the plaintiff need not be shown, in the absence of a proper plea denying the right to thus sue. *Dolson v. DeGanahl*, 70 T. 620.

(24.) In absence of allegation and proof that the "wheel of fortune," an instrument used for gaming purposes, was being used for illegal purposes at the time or before the injury complained of, an action lies for such injury to it. *Railway v. Johnson*, 71 T. 619.

(25.) Evidence of coverture, though admitted without objection, cannot be considered, when the coverture of the wife has not been pleaded in avoidance of the plea of limitation set up against her. *Harvey v. Cummings*, 68 T. 599.

Following the weight of authority, it is held that a defendant relying upon contributory negligence as a defense must allege and prove it.

The above is modified when, by the plaintiff's own testimony, a suspicion is raised that his own negligence may have contributed to the injury. *Brown v. Sullivan*, 71 T. 470.

(25b.) If a purchaser is defrauded in buying machinery, on discovery of the worthlessness of the article for the purpose intended, he has the right to rescind the contract—such right to be exercised promptly and the machine returned within reasonable time. *Aultman v. York*, 71 T. 261.

(25f) In a suit to recover a reward offered by an express company it was alleged in the petition that the proclamation offering the reward for the arrest of certain persons was made by the Pacific Express Company acting through the persons who assumed to act as its officials, and it could not be heard to deny their authority thus to bind it, unless a plea of *non est factum*, as required by the statute, was filed.

But the declarations, admissions or agreements of the defendant's agent alleged to have been made orally subsequently to the arrest of one of the persons for which the reward was offered were put in issue without a sworn plea, and were of no value to the plaintiff unless it was shown that he had authority to make them, which was not admitted by the defendant; but, on the contrary, was expressly denied.

The fact that the agent was shown to be the superintendent of the express company was not sufficient to show that he had authority to bind the company by his subsequent admissions, declarations or agreement set up in the supplemental petition. The question of his authority was in issue; the burden of proving it was on the plaintiffs, and in the absence of proof showing such authority as would enable him to bind the express company by his admissions, declarations or agreements alleged, the court did not err in refusing to admit them. *Blain & Kelly v. Express Co.*, 69 T. 74.

(25k.) Whatever is received by the creditor in satisfaction of his debt will be effectual as a payment, as between the creditor and his debtor. Receiving "time checks" of a railroad, in satisfaction of a note, by a creditor of his debtor, is a payment. [2 Greenl. Ev., sec. 516; *id.* 520; 2 Dan'l on Neg. Inst., sec. 1222; *id.* 1623; *Blair & Hoge v. Wilson*, 28 Gratt. 165; *Boulware v. Robinson*, 8 T. 330; *Ables v. Lee*, 6 T. 434; *McNeil v. McCamley*, 6 T. 165; *Robinson v. Watts*, 11 T. 768; *Cartwright v. Jones*, 13 T. 4; *Wells v. Fairbanks*, 5 T. 582; *Jennings v. Case*, 17 T. 673; *Morphy v. Garrett*, 48 T. 249; *Life Ins. Co. v. Ray*, 50 T. 518.] *Swearingen v. Buckley*, 1 U. C. 421.

Payment to an agent in Confederate money, where it was being used and passed in business transactions as money, was a valid payment, and an agent to collect could receive such notes in payment, unless forbidden by his principal.

Payment of a note to an agent in notes of other persons is not binding on the principal in the absence of proof of ratification by him.

Silence of the principal from 1861 to 1868, owing to the war and the disturbed state of the country afterwards, he being in a distant state, cannot be regarded as acquiescence in the acts of the agent performed during the war, where the principal repudiates such acts as soon as informed of them. *Garner v. Butcher*, 1 U. C. 430.

#### ART. 1265. Answer verified, when.

(1.) When matters pleaded in abatement do not appear of record, the plea must be sworn to; and if the affidavit is to the truth of the plea, according "to the best of affiant's knowledge and belief," it is fatally defective. *Graham v. McCarty*, 69 T. 323.

(2.) In trespass to try title against a subsequent purchaser of land from a common vendor, the defendant may show that no consideration was paid for the first deed, without having first filed a sworn plea setting up that fact; the deed not being pleaded, or necessary to be pleaded, is not within the rule prescribed in section 10, of article 1265, Revised Statutes. *Barnard v. Blum*, 69 T. 608.

(3.) A plea of *non est factum*, not sworn to, only requires, as does a general denial, the production of the instrument declared on, but does not require proof of execution.

In the absence of a plea of *non est factum* denying the execution of the instrument sued on, the burden of proving want of authority in the agent making it devolves upon the party denying it. *Fisher v. Bowser*, 1 U. C. 348.

(4.) Where the administrator in a suit on a promissory note against his decedent's estate is unwilling to make the affidavit required by law to a plea of *non est factum*, it is proper to permit the widow to intervene in the suit, and make the necessary affidavit to the plea, where the intervention occasions no delay. [Eborn v. Zimpelman, 47 T. 503; Eccles v. Hill, 13 T. 67.] Solomon v. Huey, 1 U. C. 265.

Suit upon promissory notes against maker and to foreclose a chattel mortgage made to secure the notes, the purchaser of the mortgaged articles was made defendant. The mortgage was attested by one witness and not acknowledged for record. The original, however, was deposited in the office of the county clerk of the county wherein, by its recitals, the maker resided. The defendants pleaded a general denial. *held*:

1. There being no plea of *non est factum*, the production of the mortgage in evidence was competent against the maker without further proof of its execution.

2. The admission of testimony to the signature of the maker by witnesses other than the subscribing witnesses was not erroneous where it appeared that the subscribing witness was without the jurisdiction of the court. Chator v. Brunswick Co. 71 T. 588.

(5.) When one attacks a written contract by sworn plea of *non est factum*, on the ground that the contract, though signed by him, did not express the real agreement, he being unable to read it, and that it was fraudulently written, it is not improper to permit him to testify that he would not have signed the written contract if he had known its contents. Chatham v. Jones, 69 T. 744.

(6.) When a written instrument appears on its face to have been altered, it devolves on the party offering it in evidence to show that the alteration was made with the consent of the maker. Dewees v. Bluntzer, 70 T. 406.

#### ART. 1269. Certain pleas to be determined during the term at which filed.

(1.) The statute requires that all dilatory pleas shall be disposed of at the first term, if the business of court will permit, and also that when a case is called for trial all issues of law and all pleas in abatement and other dilatory pleas shall be then disposed of. [Post, Art. 1291.] It has been held that if a plea in abatement be submitted with those to the merits, it is not such error as will require a reversal of the judgment. [Holstein v. Gardner, 16 T. 115; Brein v. Railway Co., 44 T. 302.] But the cases cited hold that when such practice is adopted the jury should be instructed to pass upon the plea in abatement first, and that if they find that issue in favor of the defendant they should go no further. These cases do not hold that the defendant is not required to call the attention of the court to his dilatory pleas and ask that they be tried before the trial upon the merits is commenced. Since these decisions were rendered the new rules have been adopted, which expressly require that "all dilatory pleas \* \* \* shall be first called and disposed of before the main issue on the merits is tried." [Rules for the district court, No. 24.] This rule is in strict accordance with the spirit, if not the letter, of the statute. In Peveler v. Peveler, 54 T. 53, it was held that the defendant, by continuing his cause at the first term of the court, had waived his plea to the jurisdiction. A dilatory plea, such as the plea of privilege in this case, stands very nearly upon the same footing as a demurrer upon which a defendant must specially ask the action of the court or it will be considered abandoned. [Watson v. Baker, 67 T. 48; Galveston Co. v. Noble, 56 T. 575.]

The appellants, by proceeding to trial upon the merits of the case, without specially invoking the action of the court upon the plea in abatement, must be held to have waived it; and that it matters not, so far as the disposition of this appeal is concerned, whether it should be considered a sufficient plea or not. Blum v. Strong, 71 T. 321.

## CH. 9.—CHANGE OF VENUE.

ARTS. 1270 to 1275. See Civil Statutes.



## CH. 10.—CONTINUANCE.

## ART.

1276. Not granted, except, etc. *Annotated.*1277. First application, requisites of, etc. *Annotated.*

## ART.

1278. Second and subsequent applications. *Annotated.*

1279. See Civil Statutes.

## ART. 1276. Not granted, except, etc.

(3.) A party to a suit cannot reject a continuance offered on terms imposed by the court, and take the chances of a verdict in his favor, and then ask a revision of the ruling of the court on the merits of his motion if the judgment be against him. If, however, the judgment be in his favor, after a final hearing had after a continuance granted on terms, if the question be properly raised on appeal, the ruling imposing costs as a condition of continuance, it may be reversed. *Couts v. Neer*, 70 T. 468.

## ART. 1277. First application, requisites of.

(9.) The affidavit for continuance should state the facts constituting the diligence used to obtain the testimony, and not the mere legal conclusion that diligence had been used. *Railway v. Aiken*, 71 T. 373.

An affidavit for continuance made by the plaintiff on the eighteenth of the month, when the case was called for trial, set forth that on the eleventh of the month the plaintiff caused a *subpoena* to be issued for an absent witness, which was served on the witness by the officer on the seventeenth day of the month; that the witness resided in the county where the suit was pending; that the testimony of the witness was material; that plaintiff had used due diligence to procure the testimony of the witness; that the witness had not obeyed the *subpoena*, and was not in attendance on court. The application was the first made by plaintiff. *Held*:

1. It was not necessary when the witnesses were served that the witnesses' fees should have been tendered, and this is not in conflict with *Hensley v. Lytle*, 5 T. 497.

2. A deputy sheriff may serve a *subpoena* issued in a cause wherein the principal sheriff is a party.

3. That the affidavit was made by the agent of the plaintiff was immaterial, and this case distinguished from *Robinson v. Martell*, 11 T. 75.

4. The affidavit was in strict conformity with the statute, and was sufficient. *Blum v. Bassett*, 67 T. 194.

On a first application for continuance it was not stated that "due diligence" had been used to procure the testimony of the absent witness, but the date was stated when the *subpoena* was placed in the hands of the officer. It stated that the witness had been served, but did not state when. The process was applied for when the plea of the applicant was filed on March 9th, 1886, and the application to continue was made April 2d, 1886. *Held*, that the application was properly overruled. *Brown v. National Bank*, 70 T. 750.

A second continuance was properly refused to the defendant, the railway company, upon its application, on account of the absence of an employé residing in another county, no effort having been made to take his depositions, his personal attendance being expected, but was not secured on account of a leave of absence having been granted the witness by one of the officers of the defendant. *Railway v. Scott*, 71 T. 704.

## ART. 1278. Second and subsequent applications.

(1.) A party to a suit who seeks a second continuance of the cause cannot defeat the right of his adversary to an immediate trial by making his statement of the needed evidence so indefinite as to render it uncertain what verdict the jury would have found if the witness had testified and the verdict had been based on the testimony. *Railway v. Horne*, 69 T. 643.

## CH. 11.—TRIAL OF CAUSES.

### ART.

1280, 1281. See Civil Statutes.

1282. Judgment by default. *Annotated.*

1283. See Civil Statutes.

1284. Damages on liquidated demands. *Annotated.*

1285. See Civil Statutes.

1286. Jury to assess damages, when. *Annotated.*

### ART.

1287. See Civil Statutes.

1288. Tried, when called, etc. *Annotated.*

1289, 1290. See Civil Statutes.

1291. Issues of law and dilatory pleas, tried when. *Annotated.*

1292 to 1298. See Civil Statutes.

1299. Order of argument. *Annotated.*

1300 to 1315. See Civil Statutes.

### ART. 1282. Judgment by default.

(1.) Construing articles 1263, 1280, 1281 in connection with this article, *held*, that if, on the call of the appearance docket on the fifth day of the term after suit brought, no answer be filed in a cause, and the defendant fails to ask further time to answer, a judgment by default should be rendered against him. If, however, he be present in person or by attorney, and will ask the remainder of the fifth day within which to prepare and file his answer, it should be allowed him. *Rowe v. Spencer*, 70 T. 78.

### ART. 1284. Damages on liquidated demands.

(1.) The plaintiff has the right to demand a jury on the same condition as the defendant. *Railway v. Morris*, 68 T. 49.

### ART. 1286. Jury to assess damages, when.

(1.) When judgment by default is rendered, the defendant is not entitled to have the damages claimed in the petition assessed by a jury, if he has failed in proper time and manner to demand a jury and to deposit the proper fee. *Bumpass v. Morrison*, 70 T. 756.

### ART. 1288. Tried, when called, etc.

Where parties to a suit set the case for trial in the district court for a day when by the orders of the court no jury will be in attendance, the absence of a jury will not be a reason for the continuance of the case. Litigants are chargeable with knowledge of the standing orders of the court. *Cole v. Terrell*, 71 T. 549.

### ART. 1291. Issues of law and dilatory pleas, tried when.

(3.) When no action is sought or obtained at the first term of the court on a plea in abatement, it operates ordinarily as an abandonment of the plea. *Stephens v. Lee*, 70 T. 279.

### ART. 1299. Order of argument.

(6.) The argument of counsel in addressing a jury should be confined to a discussion of facts in evidence, and when language is used relating to matters not in evidence, and of a character calculated to inflame and prejudice the minds of the jurors against the adverse party, the judgment will be reversed, especially in a case where the verdict seems excessive. *Railway v. Cooper*, 70 T. 67.

When objectionable language is used by counsel in argument, which it is believed may improperly affect the jury, objection should be made by the opposing counsel at the time; failing in this, he cannot ask a reversal of the judgment for that cause, unless the language was plainly prejudicial to an impartial trial. *Railway v. Greenlee*, 70 T. 553.

## CH. 12.—CHARGES AND INSTRUCTIONS TO THE JURY.

### ART.

1316. See Civil Statutes.

1317. Requisites of the charge. *Annotated.*

1318. See Civil Statutes.

### ART.

1319. Parties may ask instructions. *Annotated.*

1320, 1321. See Civil Statutes.

### ART. 1317. Requisites of the charge.

(2.) When on an issue made by the pleadings there is no evidence to justify its consideration, it is the duty of the judge to withdraw it from the jury. *Willis v. Whitsitt*, 67 T. 673.

(3.) When the basis for damages alleged in a petition as a result of defendant's negligence "is great suffering, permanent ill health and physical weakness" of the plaintiff, a charge which includes "physical and mental disability or weakness occasioned by the injuries" as matters on which a verdict for damages may be based, is not error. *Railway v. Silliphant*, 70 T. 623.

(4.) It is error to charge the jury even hypothetically upon a state of case the evidence did not present, and which might induce them to conclude they were at liberty to find according to the assumed hypothesis. Where the court, in its instructions to the jury, submits issues upon which there has been no evidence, and it is not clear that the jury have not been misled, the judgment must be reversed. [*Austin v. Talk*, 20 T. 167; *Yarborough v. Tate*, 14 T. 483; *Earle v. Thomas*, *id.* 583.] *Cox v. Harvey*, 1 U. C. 268; *Bigham v. McDowell*, 69 T. 100.

The submission to the jury by instructions of a hypothetical state of facts not authorized by the evidence, and upon which they are told they may predicate their verdict, is improper in practice, and though there may be no finding based on it its effect in prejudicing the finding of the jury on other issues renders it an error, the extent of which sometimes cannot be estimated. *Lee v. Yandell*, 69 T. 34.

When a charge given by the court presents a hypothesis not authorized by any fact shown by the record, and which from its nature as presented may have influenced the verdict, and the error is pointed out and excepted to at the time, it is error for which the judgment may be reversed. The fact that the trial judge in overruling the exception states his opinion that there was evidence to authorize the charge is immaterial when the record does not show such evidence. *Railway v. Kuehn*, 70 T. 583.

A charge of the court upon an abstract proposition of law, which, though correct in itself, is not applicable to the facts in evidence before the jury, can only tend to mislead, and is error. *Railway v. Silliphant*, 70 T. 623.

A charge predicated on a condition of facts not sustained by the evidence, but which from its very nature could not have misled the jury, will afford no ground for reversal. *Railway v. Greenlee*, 70 T. 553.

(5.) A charge as to a presumption arising from a given state of facts is a charge upon the weight of evidence, except in those cases in which the law raises a conclusive presumption. *Biering v. Bank*, 69 T. 600.

It is not proper for a trial judge in charging a jury to attempt to define duties, neglect of which would be negligence, in the absence of a statutory definition of duties which, when disregarded, are negligence as a matter of law. The judge should inform the jury as to the degree of care or skill which the law demands of the party and what duty it devolves on him, and the province of the jury is to find from the facts in evidence whether that duty has been done. *Railway v. Lee*, 70 T. 496.

When the court instructs a jury that the omission to do an act which may constitute negligence is or is not sufficient to establish it, it necessarily passes upon the weight to be given to the fact that the omission occurred when it might have been avoided. Such a charge is violative of the statute. *Costley v. Railway*, 70 T. 112.

While it is a rule of law that the burden is upon the party alleging the affirmative of an issue, it is not always necessary or proper to give it in charge to the jury. In many cases testimony bearing upon the issue comes from both plaintiff and defendant, and in passing upon the entire testimony the jury should not have their attention directed to the party from whom the testimony may come. It is sufficient if the charge indicates the questions of fact to be found. *Blum v. Strong*, 71 T. 321.

The appellee was the only witness examined who had a pecuniary interest in a suit on a trial of which the following charge was asked: "In determining the credibility of the witnesses and the weight you should give their evidence, you are authorized to consider the interest which such witnesses have in the matter in controversy, and their demeanor and manner of testifying upon the stand." *Held*, the charge was properly refused. To give it would have been to have virtually instructed the jury to consider the witness' interest in determining whether they would believe his testimony, and would have been a charge on the weight of evidence. *Willis & Bro. v. Whitsitt*, 87 T. 678.

It was shown during the progress of a cause that the plaintiff, who offered himself as a witness, had been convicted of a felony, and was afterwards pardoned by the governor. The jury was instructed that "the proclamation of the governor renders the plaintiff a competent witness, leaving his credibility to be determined by you from all the facts and circumstances in evidence." *Held*, that the charge was not a charge on the weight of evidence. *Costley v. Railway*, 70 T. 112.

A charge which intimates to the jury that the testimony of a party to the suit might not be sufficient to warrant a finding upon it, if it appeared that he could have brought other testimony to the fact, is improper as upon the weight of evidence. *Baines v. Ullman et al.*, 71 T. 529.

(6.) In charging a jury, questions of fact should be submitted without comment, and care observed to avoid giving prominence to any, in such terms as to indicate the tendency of the mind of the trial judge. *Lee v. Yandell*, 69 T. 34.

It is improper for the court to call the attention of the jury to particular parts of the evidence; and a charge which instructs the jury to "look to the declarations of the plaintiff to see whether she ever claimed the property in question as her homestead, and to her declarations about leaving it, and they will look to the evidence to see whether she did leave it, or leave the state in accordance with her declarations, and if so, then her declarations are evidence of her intention, and if the evidence shows that she left the state in 1866, and refused to return when requested by her husband by letter, then the abandonment is complete, and the jury will find for defendant," is a charge upon the weight of evidence and erroneous. [28 T. 566; 26 T. 212; 13 T. 175; 20 T. 247; 22 T. 479.] *Burcham v. Gann*, 1 U. C. 333.

Ordinarily the repetition in a charge of the court of the elements of damage which the jury may consider, will not require a reversal of a judgment rendered against the defendant; but when the verdict seems excessive a reasonable presumption arises that the jury may have been influenced thereby. *Railway v. Gordon*, 70 T. 80.

(7.) A new trial should be awarded when the charge of the court is so worded as to assume the existence of a material controverted fact involved in the issue, regarding which the evidence is conflicting, and the verdict is in accordance with such assumption. *Boaz & Co. v. Schneider & Davis*, 69 T. 128.

An element of damages based on the future capacity of the injured party to earn money and to acquire greater skill with which to earn it, when it is shown that he was physically disabled by the injuries inflicted, should not be referred to by the court in charging the jury when there is no evidence to enable them to intelligently consider it. *Railway v. Gordon*, 70 T. 80.

In an action for damages for injuries resulting from the overflow of land caused by a railroad embankment, the charge clearly stated to the jury what facts would render the railway company liable, and informed the jury in terms that could not have been misunderstood that the plaintiff would not be entitled to recover for any injury he might have avoided by the exercise of due care. The charge also clearly informed the jury that the railway company would not be liable if the overflow resulted from extraordinarily heavy rains and high water in the rivers, against which ordinary prudence could not have provided; and that this was not repeated in any paragraph of the charge which bore on the question of defendant's liability, could not have misled any jury of ordinary intelligence.

There being evidence such as would have enabled the jury to make estimates of damages in the manner suggested in the charge, the court gave this charge:

"If you find for plaintiff, to determine the amount of damage, if any has been shown you, and to inquire whether from the evidence any injury is shown to plaintiff's pasture;" if they found the standing water, as before explained, covered it, to find what, if any, the evidence showed them was the value per acre of the land for pasturage of horses and cattle during the year 1885, that they might find what, if any, was the value for one year, and then take the proportionate rate for the length of time, if any, the evidence showed them the plaintiff was deprived of his pasture; or that they might find the value of the use of the land for pasturage, if any be shown by the evidence, for one day, week or month, if any be shown, and to that add, if any be shown by the evidence, such number of days, weeks and months, if any, as are shown, and arrive at the amount of time, if any, plaintiff was deprived of his pasturage.

A charge of this kind is objectionable in any case, and it is always better to leave the jury to reach their conclusions, under the evidence properly before them, and the charge of the court as to the law of the case, through such modes of reasoning and processes of thought as each juror may, unaided by suggestions from the court, naturally and without constraint, pursue. *Railway v. Broussard*, 69 T. 617.

(9.) It is not error for the court to instruct the jury in trespass to try title to find for that party in whom the undisputed written evidence shows that the title is vested. *Edwards v. Barwise*, 69 T. 84.

**ART. 1319. Parties may ask instructions.**

(3.) Where the general charge by the court is clear and applicable to the case made by the testimony, it is proper to refuse instructions upon the same subjects. *Railroad v. Eckford*, 71 T. 274.

A charge as to such parol agreement authorized by the testimony was proper, and any exception in favor of an innocent purchaser should have been asked. *Edwards v. Smith*, 71 T. 156.

## CH. 13.—THE VERDICT.

**ART.**

1322. See Civil Statutes.

1323. Must be in writing and signed.

*Annotated.*

1324 to 1329. See Civil Statutes.

1330. Special verdict. *Annotated.*

**ART.**

1331. Requisites of special verdict. *Annotated.*

1332. See Civil Statutes.

1333. Verdict of jury; conclusions of judge. *Annotated.*

1334. See Civil Statutes.

**ART. 1323. Verdict must be in writing, etc.**

(4.) In a suit for the recovery of the value of specific articles converted, the rule which requires the jury to find the value of each article is intended for the benefit of the defendant, who should have the privilege of returning the articles, or any of them, in satisfaction of the judgment *pro tanto*. A failure of the jury to find the value of each article is not an error for which a judgment can be reversed on exceptions by a plaintiff. *Cole v. Crawford*, 69 T. 124.

It was not necessary for the court to submit to the jury the separate value of each piece of property, and the finding of its value in gross did not operate in any manner to the prejudice of appellant. It is held [*Hoeser v. Kroeka*, 29 T. 450, following *Blackey v. Duncan*, 4 T. 185] that in a suit for the specific recovery of several articles of personal property, the jury should find the value of such articles separately. But in both the cases cited this is put solely upon the ground that it is the privilege of the defendant to return any one or more of the articles recovered in satisfaction *pro tanto* of the judgment, and that he is deprived of this right by a verdict of the value in gross. This rule is believed to be purely for the benefit of the defendant, and it is not the defendants in this action who here complain. *Cole v. Crawford*, 69 T. 124.

(11.) That a verdict rendered in a suit for the recovery of damages for a tort in a case where the evidence bearing on the issue was conflicting, was the result of a compromise of the conflicting opinions of the jurors, affords no ground for reversal. *Owens v. Railway Company*, 67 T. 679.

(15.) The jury in an action for damages for personal injury against a railway company was asked to return answers to the following questions: "4. Was the wreck which occasioned the injury caused by a defective or unsafe road bed? 5. Or was the wreck caused by a defective locomotive?" The jury answered "yes" to both questions. *Held*, that when the verdict seems excessive, though such conflicting findings would not ordinarily authorize a reversal, yet such finding may be looked to in determining whether the jury has given due consideration to the evidence. *Railway v. Gordon*, 70 T. 80.

(16.) Unless from the record of the trial it is manifest that the verdict was a correct one, notwithstanding an erroneous charge, a judgment will be reversed.

whenever an erroneous instruction upon a material point has been given which may have influenced the jury, although the evidence may appear to the appellate court to be sufficient to sustain the verdict. [Mims v. Mitchell, 1 T. 443; King v. Bremond, 25 T. 637; Vaughan v. The State, 21 T. 752; Bailey v. Mills, 27 T. 438; Belt v. Raguet, *id.* 472; Chandler v. Fulton, 10 T. 21.] Franklin v. Smith and Harvin, 1 U. C. 229.

**ART. 1330. Special verdict.**

(3.) Whether a cause shall be submitted to a jury on special issues or not, is a matter resting in judicial discretion. *Cole v. Crawford*, 69 T. 124.

There is no uniform practice determining the mode of forming and submitting special issues to a jury; they may be prepared by counsel and sanctioned by the court, formulated by the judge at the request of counsel, or on his own motion, to meet the requirements of the case in the furtherance of justice. When a special verdict is rendered, no other facts can be looked to in aid of the judgment. *Heflin v. Burns*, 70 T. 347.

A general charge is unnecessary when a cause is submitted to the jury on special issues. *Cole v. Crawford*, 69 T. 124.

**ART. 1331. Requisites of special verdict.**

(1.) When a cause is submitted to a jury on special issues, all the issues of fact made by the pleading must be submitted and determined by them before final judgment upon a verdict can be rendered. *Cole v. Crawford*, 69 T. 124.

A verdict which is not responsive to the instructions of the court is sufficient if it be responsive to the issues presented by the pleadings as to enable the court to adjudicate the rights of the parties. *Harkey v. Cain*, 69 T. 146.

(3.) While irregular for the jury in one case to render a general and special verdict, yet where they are consistent, and the same judgment would follow upon each, the irregularity is of no consequence. But where the finding upon special issues is contradicted by the general verdict, no judgment can be rendered, and the verdict should be set aside. *Blum v. Rogers*, 71 T. 668.

**ART. 1333. Verdict of jury; conclusions of judge.**

(2.) When the trial judge to whom a cause is submitted reduces his conclusions of fact and law to writing, his failure to find a particular issue claimed by counsel to be material is not error, unless, from an inspection of the record, it should appear to the supreme court material that a finding should have been had on it. *Goode v. Lowrey*, 70 T. 150.

The failure of the trial judge to place on record his conclusions of law and fact cannot afford ground for a reversal of a judgment, unless such failure was made the subject of a bill of exceptions. *Cleveland v. Sims*, 69 T. 153.

If a party intends to have a case revised on the conclusions of fact and law found by the judge who tried the case, he should except to the conclusions, and have his exceptions noted in the judgment entry. *Continental Ins. Co. v. Miliken*, 64 T. 46.

When exceptions are taken to the judgment below the appellant is not precluded from attacking the findings of the trial judge, even though exceptions were not taken to the findings. *Voight v. Mackle*, 71 T. 78.

(3.) Exceptions to conclusions of law and fact are not necessary where a statement of facts and bills of exceptions are brought up in the record. *Tudor v. Hodges*, 71 T. 392.

## CH. 14.—JUDGMENTS.

**ART.**

1335. Judgments, how framed. *Annotated.*

1336 to 1338. See Civil Statutes.

1339. Court shall enforce its own decrees. *Annotated.*

**ART.**

1340. Judgment of foreclosure of liens. *Annotated.*

1340a to 1350. See Civil Statutes.

**ART. 1335. Judgments, how framed.**

(1.) A judgment based on a verdict returned in response to an issue not presented by the pleadings will be reversed. *Graham v. McCarty*, 69 T. 323.

In a suit against an agent by his principal, who was joined with other defendants, when a recovery is sought for the value of property belonging to the prin-

cipal, and sold and converted by the agent and the purchasers, his co-defendants, and the co-defendants ask no judgment over against the agent in the event of a recovery against themselves, it is not error to enter judgment on a verdict returned, under instructions, against the co-defendants alone, and in favor of the agent. *Coleman & Davidson v. Colgate*, 69 T. 88.

(3.) Where the verdict is found upon special issues, the appellate court cannot look beyond it to any fact apparent in the record in aid of the judgment. [29 T. 391; 27 T. 406; *id.* 685; 22 T. 306; 40 T. 238; 44 T. 284; *id.* 626; 45 T. 342.] *McShau v. Meyers*, 1 U. C. 100.

The recitation in the judgment that the purchase money with interest from an incorrect date amounts to a stated sum is immaterial, when it appears that the amount for which the judgment was rendered, being the amount so stated, does not exceed the sum for which the party complaining was justly liable. *Dean v. Blount*, 71 T. 271.

**ART. 1339. Court shall enforce its own decrees.**

(1.) In a suit for a cow and her increase, it appearing that defendant had taken the cow, and while the cow was in his possession she had the two calves sued for, *held*, that proof of ownership of the cow entitled plaintiff to judgment for the increase also.

In such suit the measure or extent of recovery would be the value of the property at the time of the verdict, or where restitution is ordered at the time of refusal by defendant to comply with the writ. *Morris v. Coburn*, 71 T. 406.

**ART. 1340. Judgments of foreclosure of liens.**

(2.) This article prescribes the form of decree to be rendered foreclosing a mortgage without regard to whether it be personal property or realty. *Frankel v. Byrnes*, 71 T. 308.

The authority of a sheriff in the seizure and sale of property is limited by the terms of the writ. Hence though the judgment may have been rendered on a note secured by mortgage on personal property subject to mortgage at the time it was executed, yet if before levy the property had become attached to the business homestead as a fixture needed in the prosecution of the mortgagor's business, and there was no judgment entry foreclosing the mortgage, and execution issued running against the general assets of the defendant, the mortgaged property thus attached as a fixture to the homestead freehold would not be subject to seizure and sale under such general writ. The fact that the residence homestead of the debtor was, at the date of the levy of the writ, on leased property, would be immaterial.

The mortgage upon the property seized not being foreclosed, could not affect the question of its liability to levy and sale. *Low v. Tandy*, 70 T. 745.

## CH. 15.—REMITTER AND AMENDMENT OF JUDGMENT.

**ART.**

1351. Remitter of excess in verdict. *Annotated.*

1352, 1353. See Civil Statutes.

1354. Mistakes in judgments corrected in open court. *Annotated.*

**ART.**

1355. Misrecitals, etc., corrected in vacation or term time. *Annotated.*

1356, 1357. See Civil Statutes.

**ART. 1351. Remitter of excess in verdict.**

(2.) The trial judge cannot overrule a motion for new trial in a suit for damages for personal injury, on the ground that a *remitter* has been entered by the plaintiff, when the motion is based on the fact that the damages awarded were excessive. The judge cannot thus invade the province of a jury by measuring the damages for which they should have returned a verdict. *Railway v. Coon*, 69 T. 731.

**ART. 1354. Mistakes corrected in open court.**

(1.) The power of a court to alter or reform its judgment continues during the term. If after judgment against several, it shall appear that one of the defendants had not been served with process, and that as to him jurisdiction had not attached, the judgment may be reformed so as to relieve the party not served from

its operation, and continue in force against the other defendants. If the defendant not properly before the court is a partner with a defendant who was properly served, and the suit is on a claim due from the partnership, it is proper to so reform the judgment as to exempt from individual liability the partner not served, and render the judgment against the partnership, and the members thereof individually on whom service was obtained. *Henderson v. Banks*, 70 T. 393.

An application to correct a judgment by parol testimony on the ground of mistake, made twenty-six years after the alleged mistake occurred, with no allegation of ignorance, comes too late. Where it is sought to correct a mistake in a judgment by application in the court where it occurred, the application, by analogy to a bill of review, would be limited to two years from the time of the discovery of such mistake. [*Milam Co. v. Robertson*, 47 T. 235; *Weaver v. Shaw*, 5 T. 289; *Connolly v. Hammond*, 51 T. 647; *Smith v. Fly*, 24 T. 352; *Kuhlman v. Baker*, 50 T. 636; *Munson v. Hallowell*, 26 T. 475; *Alston v. Richardson*, 51 T. 6; 2 Story Eq. Jur., §1521a.] *Williamson v. Wright*, 1 U. C. 711.

**ART. 1355. Misrecitals in judgments, etc., corrected.**

(2.) An amendment of a judgment made on the last day of the term, but which is of a character authorized by statute to be made at any time, is not, when the case was first submitted for determination by the judge on the law and the facts more than three days before the close of the term, violative of Rule 65 for the government of district courts. *McPherson v. Johnson*, 69 T. 485.

## CH. 16.—BILL OF EXCEPTIONS.

**ART.**

1358. Exceptions to rulings taken, when. *Annotated.*

1359. Requisites of bills of exceptions. *Annotated.*

**ART.**

1360 to 1362. See Civil Statutes.

1363. How reserved. *Annotated.*

1364 to 1367. See Civil Statutes.

**ART. 1358. Exceptions to rulings taken, when.**

(1.) The action of the court below in refusing to postpone the trial of a cause cannot be considered in the absence of a bill of exceptions. *Moss v. Katz & Mayer*, 69 T. 411.

(2.) A bill of exceptions based upon the exclusion of the testimony of a witness will be disregarded if it fails to disclose the character of the excluded evidence. *Beeks v. Odom*, 70 T. 183.

Only such objections as are urged to the admissibility of testimony will be considered on appeal. Objections to depositions are governed by statute. *Tevis v. Armstrong et al.*, 71 T. 59.

Unless it is shown by the bill of exceptions what it is expected to prove in answer to the excluded question, the assigned error in excluding the question will not be considered. *McAuley v. Harris*, 71 T. 632.

(3.) In order to subject the action of the trial court to revision on appeal, it must be excepted to at the time. The office of the bill of exceptions is to show the proceedings of the court which do not otherwise appear of record, and the mode of its authentication being provided by law, the mere statement of the judge, although written by him and signed officially, cannot be received as its substitute. *Owens v. Railway Co.*, 67 T. 679.

One who excepts, in the trial of a cause in trespass to try title, to the action of the court in excluding a judgment which, in its proper connection, would be admissible, can derive no benefit on appeal from the exception, when there is nothing in the record to show that he had by evidence connected himself with it. *Stark v. Ellis*, 69 T. 543.

**ART. 1359. Requisites of bill of exceptions.**

(1.) When the record shows no statement of facts from which the materiality of excluded testimony can be determined, and the bill of exceptions based on such exclusion fails to state enough of the facts established in the case to make intelligible the ruling of the court in reference to the issue made by the pleadings, the exception will be disregarded on appeal. *Stark v. Ellis*, 69 T. 543.



ART. 1363. How reserved.

(2.) A bill of exceptions incorporated in a statement of facts, filed by order of court after the adjournment of the term, cannot be considered, following *Railroad Company v. Eddins*, 60 T. 656. *Yoe & Harris v. Montgomery*, 68 T. 338.

## CH. 17.—NEW TRIALS AND ARREST OF JUDGMENT.

ART.

1368. New trials, etc., may be granted:  
*Annotated.*

ART.

1369 to 1376. See Civil Statutes.

ART. 1368. New trials may be granted.

(2.) The refusal of the court to permit the answer of a witness to be read, whose answers to the same effect are already in evidence, will not afford ground for reversal. *Couts v. Neer*, 70 T. 468.

The fact that a party seeking a new trial did not understand a witness who testified in plain language, and that if he had properly understood him, evidence would have been introduced material to the issue, and which would be produced on another trial to correct his evidence, will not avail on motion for new trial.

Neither will the fact that a witness who was not examined was so fatigued by her journey in attending court, that she could not testify, afford ground for new trial, no matter how material her testimony, when no postponement of the trial was asked, nor any of the means resorted to provided by statute for securing her evidence. *Richards v. Smith et al.*, 67 T. 610.

A new trial will not be granted on the ground of surprise, because of the testimony of a witness being different from what counsel understood from the witness before the trial would be his testimony, when there was no evidence of an intention on the part of the witness to deceive. *Fears v. Albee*, 69 T. 437.

The absence of a party who could have established material facts not known to his attorney, is not ground for a new trial. *Helm v. Weaver*, 69 T. 143.

The arrest and detention from the court room of a party whose suit is being tried, and who is thereby deprived of the benefit of his own testimony, is sufficient in a suit to obtain a second trial of property rights to excuse the failure to present evidence on the former trial, and this though the party was represented by counsel.

The failure of such a party to move for a new trial within the period prescribed by law, and after his release and return to the court room, cannot be excused by the fact that his counsel refused to file the proper motion, and that he could procure the services of no other attorney. The court, on proper application, would have assigned counsel. *McGloin v. McGloin*, 70 T. 634.

(3.) When illegal evidence is admitted over objections, and on appeal it is not made to appear clearly that the evidence could not have prejudiced appellant, the judgment will be reversed. *Deweese et al. v. Bluntzer*, 70 T. 406.

The fact that a witness, in a proceeding to probate a will, had testified under an agreement with one interested in the probate, that he should receive a sum of money for his services in testifying as an expert, and a still larger sum if the will was admitted to probate, if the fact be not known to the party adversely interested until after the trial, will not afford ground for a new trial if, considering all the testimony, it is apparent that no different judgment could have been rendered. *Beeks v. Odom*, 70 T. 183.

Evidence improperly excluded from the jury can afford no ground for the reversal of the judgment, if, from an examination of the entire case, it is manifest that it could not have affected the verdict if it had been admitted. *Alsop & Thompson v. Jordan*, 69 T. 300.

(5.) A judgment rendered on a verdict returned under an erroneous charge, will not be disturbed if under the facts in evidence the same verdict would necessarily have been rendered if a proper charge had been given. *Hussey v. Moser*, 70 T. 42.

(9.) When it is evident that an irregularity was committed on the trial of the cause, either in the introduction of testimony or in permitting writings to be taken

by the jury in their retirement which should have been withheld from them, yet, if on an inspection of the record no other judgment could properly have been rendered, it will afford no ground for reversal. *Beeks v. Odom*, 70 T. 183.

(10.) A new trial will not be granted to enable one to procure evidence which ordinary diligence would have secured on the trial, especially when it is cumulative. *Fears v. Albea*, 69 T. 437.

When, in a motion for new trial on account of newly discovered evidence, it is apparent from the facts stated that a failure not to discover the evidence sooner was negligence, a new trial will be refused. A motion for new trial for such a cause is fatally defective when not supported by the affidavit of the party seeking the new trial. *Moore v. Wills and Wife*, 69 T. 109.

A new trial for newly discovered testimony will not be granted when its object is merely to contradict an inference deducible from the testimony of the successful party, and when the affidavit of the impeaching witness is not filed and it is not shown that his testimony could be obtained on another trial. *Gassoway v. White*, 70 T. 475.

(11.) A court of equity will vacate a judgment or decree obtained by false testimony if it be shown that the false testimony was obtained through the procurement or connivance of the party to be benefited by it. The district courts of Texas exercising equity powers will, by re-examining a case on its merits, grant relief when it is made to appear that a judgment was obtained by fraud, mistake or accident, and where there has been no want of diligence on the part of the person against whom the judgment was rendered.

*Laith v. McDonald*, 7 Kansas, 254; *Bell v. Walnitzch*, 39 T. 194; *Burgess v. Levensgood*, 2 Jones' Equity, 460, and *Peagram v. King*, 2 Hawks, 297, approved.

Relief may be obtained against a judgment in a divorce case, when procured by the fraud of one of the parties, when the complaining party was prevented by such fraud from presenting the case fully at the time the decree was entered, if there was no want of diligence in the complainant; and such relief may be obtained in a new suit brought to correct the wrong, though begun after the close of the term at which the decree was rendered. The doctrine announced in *Green v. Green*, 2 Gray, 361, in regard to the exercise of such revisory powers in a suit brought after the close of the term at which the decree was entered, disapproved or qualified.

The discovery after the term of a material fact, which being revealed would have resulted in a different judgment, and of which the injured party was unavoidably ignorant during the progress of the cause, and which such party could not know by reasonable diligence, constitutes a basis for equitable relief.

The husband being, under the laws of Texas, the custodian of the community interest of himself and wife, and invested with the power of its disposition, a fraudulent concealment of its extent and value from his wife, followed by his perjury as to that value in a proceeding against the wife for divorce, will, on its discovery by the wife, entitle her to a review of the decree settling their property interests, there being no want of diligence to discover the facts on her part. *McMurray v. McMurray*, 67 T. 665.

(12.) The order of a court, setting aside a judgment and granting a new trial, is not void because made without a motion, and the final judgment of the court in the case will not be reversed on account of such erroneous action of the trial court. *Aycock v. Kimbrough*, 71 T. 330; See *Lloyd v. Brink*, 35 T. 1.

## CH. 18.—STATEMENT OF FACTS.

ART.

1377. Statement of facts agreed on by the parties. *Annotated*.  
1378, 1379. See Civil Statutes.

ART.

1379a. Statement may be filed after time allowed by order, when. *Annotated*.

ART. 1377. Statement of facts.

(3.) In the absence of a statement of facts, no reversal can be made of a judgment rendered in the cause by the district court on account of the fact that

charges were given to the jury which, as abstract propositions, were erroneous. Unless they operated to the appellant's injury in the particular case, they would be immaterial, and whether they did or not could not be determined when no statement of facts was made out. *White v. Parks et al.*, 67 T. 605.

(9.) The supreme court cannot impeach the truth of a statement of facts agreed on by counsel, and signed by the trial judge. If any portion of it fails to agree with a bill of exceptions which refers thereto, there is no means whereby the supreme court can tell which is correct, or whether error was committed in the matter to which the exception refers. *Wiseman v. Baylor*, 69 T. 63.

(12.) The statement of facts made up by counsel on a former appeal cannot be used in evidence for the purpose of contradicting a witness on a subsequent trial. *Sinclair v. Stanley*, 69 T. 718.

(13.) An agreement between opposing counsel incorporated in the transcript to the effect that the evidence found in the statement of facts contained in the transcript of another cause on appeal may be used in the supreme court, contemplates a mode of procedure not recognized by law, and will be disregarded. *Johnson v. Railway*, 69 T. 641.

**ART. 1379a. Statement may be filed after time allowed by order, when.**

A motion for new trial was overruled on the last day of the term, and an order entered allowing ten days for statement of facts, the defendant's counsel refusing to agree to a statement of facts presented by plaintiff against whom judgment had been rendered. Three weeks elapsed from the time the judgment was rendered until the motion for a new trial was overruled. After five days had elapsed, plaintiff's counsel committed to the mail his statement of facts, directed to the judge who was holding court in another county. The statement of facts was not signed by the judge until the expiration of the ten days. In an original action for a new trial, *held*:

1. Without deciding whether an original petition for new trial could be entertained in any case on the ground that a party against whom judgment was rendered had been deprived without fault on his part of an opportunity fairly to present his case on appeal or writ of error, no proper diligence to obtain a statement of facts in this case was shown.

2. The statement of facts should have been presented in person or by attorney or messenger, and should not have been entrusted to the mail. *Proctor v. Wilcox*, 68 T. 219.

## CH. 19.—APPEAL AND WRIT OF ERROR.

### ART.

1380. Appeal to supreme court. *Annotated.*

1381 to 1399. See Civil Statutes.

1400. Cost bond on appeal or writ of error. *Annotated.*

1401. Appeal by party unable to give cost bond. *Annotated.*

### ART.

1402 to 1409. See Civil Statutes.

1410. Transcript. *Annotated.*

1411. What to contain. *Annotated.*

1412 to 1414. See Civil Statutes.

1415. Transcript shall contain what. *Annotated.*

1416 to 1419. See Civil Statutes.

**ART. 1380. Appeal to supreme court.**

(1.) When an appeal from a judgment of the district court is perfected during the term at which the judgment is entered, the jurisdiction of the supreme court attaches on the adjournment of the term; if, at the time of the appeal, an injunction in the case exists, on perfecting the appeal, and the attaching of jurisdiction in the supreme court, the injunction follows the jurisdiction and becomes the injunction of the supreme court.

A judgment is final which disposes of all matters in controversy as to all the parties to a suit; hence, a judgment dissolving an injunction which was once issued to restrain a railway company from constructing and operating its road, when to secure such restraint was the object of the suit, is a final judgment. From such a judgment an appeal may be taken, which will give jurisdiction to

the supreme court over the case; and this, though the case may have been dismissed by the court below, on the plaintiff's request, after the entry of the order dissolving the injunction. *G. C. & S. F. Ry. v. F. W. & N. O. Ry.*, 68 T. 98.

An order appointing a receiver and granting an injunction against proceedings under attachments, made at suit of subsequent attaching creditors attacking the older attachments for fraud is an interlocutory order, the main issue being the attack against the validity of the prior attachments.

Appeal does not lie from such an order, it not being a final judgment. *Lumber Co. v. Williams*, 71 T. 444.

**ART. 1400. Cost bond on appeal or writ of error.**

(5.) It was objected to an appeal bond that the names of the sureties do not appear in the body of the bond, and that it does not appear in the face of the bond that the persons who signed as sureties so intended to be bound. The name of the principal appears in the face of the bond, and a blank was left for the names of the sureties who did sign it, from which it appears that all the persons who signed it, except the named principal, signed as sureties. This was sufficient. *Baldrige v. Penland*, 68 T. 441.

(6.) In the case of *Frees v. Baker*, decided at the Austin term, 1887, it was held that an appeal-bond signed with a partnership name as surety was not sufficient. On an appeal-bond it may become necessary for this court to render a judgment, and in such case there would be nothing in the record, when the partnership name alone is signed as surety, to enable this court to render such a judgment as ought to be rendered. To enforce a liability upon an attachment bond, however, the party seeking to enforce it, either by way of reconvention or original action, would have an opportunity to allege who composed the firm whose name appeared as surety, and thus furnish the trial court with the information necessary to enable it to render a judgment against the proper parties. *Donnelly v. Elser*, 69 T. 282.

**ART. 1401. Appeal by party unable to give cost bond.**

(2.) An affidavit of poverty, made for the purpose of appealing from a judgment of court, must identify the judgment appealed from with the same certainty required in an appeal-bond. *Perry v. Scott*, 68 T. 208.

**ART. 1410. Transcript.**

(2.) If an appellee be not satisfied with the transcript filed by the appellant, it is his privilege to procure and file a more perfect record for the presentation of the questions involved. His transcript should be filed with appellant's transcript, and have the same number, so that the appeal may be treated as one case. *Cassin v. Zavalla County*, 71 T. 203.

**ART. 1411. Transcript to contain what.**

(1.) Papers which neither constitute part of the pleading, statement of facts, or bill of exceptions, when incorporated in the transcript, will be disregarded. *Stark v. Ellis*, 69 T. 543.

**ART. 1414. Agreed statement of pleadings and proof.**

(1.) A statement of facts agreed upon before trial between the parties to a cause upon which the court below may render judgment according to the law arising upon the facts as agreed upon, cannot, on appeal, be considered, within the meaning of this article, an "agreed case."

The statute provides that parties desiring to appeal without the necessity of setting out all the proceedings at length in the transcript, may, with the consent and approval of the judge trying the cause, agree upon a statement of the case and of the facts proven, which, signed and certified to by the judge, and filed as a part of the record, shall, with a copy of the judgment, assignment of errors, bond, etc., be a sufficient transcript of the proceedings to be taken to the supreme court; and a statement which fails to state the nature and character of the suit, the plaintiff's claim, and defendant's defense, and which does not appear to have been filed, is insufficient as an "agreed case." *Heirs of Fisher v. Leisweitz*, 1 U. C. 330.

**ART. 1415. Transcript must contain what.**

(2.) The supreme court will not revise the judgment rendered in a cause when the transcript filed on appeal contains nothing but the judgment appealed from and proceedings in the court below after its rendition. *Watson v. Watson*, 69 T. 106.

## CH. 20.—COSTS AND SECURITY THEREFOR.

### ART.

1420, 1420a. See Civil Statutes.  
1420b. Payment of costs, how enforced.  
*Annotated.*  
1420c to 1437. See Civil Statutes.

### ART.

1438. Affidavit of inability to give security for costs. *Annotated.*  
1439 to 1442. See Civil Statutes.

### ART. 1420b. Payment of costs, how enforced.

(1.) Article 1420a applies only to pending suits up to the adjournment of a term of court in which no final judgment has been rendered. Article 1420b gives a remedy for the collection of costs incurred before final judgment, in case a demand for their payment has not been complied with, but no remedy is given by either article for costs incurred after the close of the term at which final judgment is rendered. A bill of costs incurred after final judgment, and the end of the term, and made by reason of suing out a writ of error, does not have the force and effect of an execution, and any sale made thereunder, as under execution, is void. *Wilson v. Simpson*, 68 T. 336.

### ART. 1438. Affidavit of inability to give security for costs.

(1.) This article does not relieve the affiant from liability for costs incurred by him, or for all costs in the suit, if judgment should be rendered against him. *McPherson v. Johnson*, 69 T. 484.

## CH. 21.—GENERAL PROVISIONS.

### ART.

1443 to 1445. See Civil Statutes.  
1446. No *mandamus* on *ex parte* hearing. *Annotated.*  
1447 to 1449. See Civil Statutes.  
1450. Suits consolidated, when. *Annotated.*  
1451 to 1460. See Civil Statutes.  
1461. Receivers appointed, when. *Annotated.*  
1462. Person interested, or not a citizen, cannot be appointed. *Amendment.*  
Appointment void, when. *Amendment.*  
Charter of corporation forfeited, when. *Amendment.*  
1463 to 1465. See Civil Statutes.  
1466. Application of money by receivers. *Amendment.*  
Judgments entitled to preference lien.  
Suit not abated by discharge of receiver.  
Execution issued against receiver.

### ART.

1466. Property remains subject to lien of judgments.  
Person to whom property is delivered liable for debts.  
Suit not abated by discharge of receiver.  
Judgments against receiver entitled to preference lien.  
Parties receiving back or purchasing property liable for debts.  
Unpaid judgments and claims not sued on have a preference lien.  
Appeal, etc., perfected, how.  
1467. See Civil Statutes.  
1468. Suits by and against receiver, brought how. *Annotated.*  
1469 to 1470i. See Civil Statutes.  
1471. Auditor appointed, when. *Annotated.*  
1472. Report verified by affidavit. *Annotated.*  
1473. Shall be admitted in evidence, etc. *Annotated.*  
1474 to 1481. See Civil Statutes.

### ART. 1446. No *mandamus* on *ex parte* hearing.

(1.) *Mandamus* is the proper remedy to compel the issuance of a warrant on the county treasurer for the payment of the audited claim.

Though the practice in such cases is to swear to the petition, the statute does not expressly require it. *Brown v. Ruse*, 69 T. 589.

**ART. 1450. Suits consolidated, when.**

(4.) When suits are brought by the same plaintiffs against the same principal defendant on separate obligations to secure the faithful performance of official duties by the principal defendant, and there are different sureties on the several bonds which were given for different terms of official service, and who are defendants in the suits brought on their respective bonds, the suits cannot be consolidated, though the plaintiff may be unable to state under which term of official service a misappropriation of funds by the principal defendant occurred. *Screwmen v. Smith*, 70 T. 168.

**ART. 1461. Receivers appointed, when.**

(1.) When the prayer in a bill, which seeks the appointment of a receiver, describes the property for the control of which the receiver was asked, other property, though included in the order making the appointment, if the description given thereof is not in the prayer of the bill, is not thereby placed in *custodia legis*; as to it the jurisdiction of the court not having attached, the order placing it in the hands of the receiver is without authority of law, and void. *Railway Company v. Whitaker*, 68 T. 630.

**ART. 1462. Person interested, or not a qualified voter in this state, cannot be appointed receiver.**

No party, attorney, or any person interested in any way in an action for the appointment of a receiver, shall be appointed receiver therein, nor shall any person be appointed receiver in any case where the property lies within this state, unless the person appointed at the time of his appointment is a *bona fide* citizen of the State of Texas and qualified to vote, and during the pendency of said receivership the person or persons so appointed receiver to keep and maintain actual residence within this state. And if [in] any action for the appointment of a receiver the property sought to be placed in the hands of a receiver is situated partly in this state and partly without, then no person shall be appointed receiver of that part of the property situated in this state, unless such person at the time is a *bona fide* citizen of this state and qualified to vote, and during the pendency of said receivership the person or persons so appointed receiver to keep and maintain actual residence within this state.

**APPOINTMENT VOID, WHEN.** And if any person should be appointed receiver of property situated in this state, or a part of which is situated in this state and a part without, who is not at the time a *bona fide* citizen of this state and entitled to vote, all such appointments shall be absolutely null and void in so far as the property situated within this state is concerned.

**CHARTER OF CORPORATION FORFEITED, WHEN.** And if any corporation owning property in this state and chartered by this state shall have a receiver of its property situated in this state appointed who is not at the time of appointment a *bona fide* citizen of this state and qualified to vote, said corporation shall thereby forfeit its charter, and it shall be the duty of the attorney-general to at once to prosecute a suit by *quo warranto* against said corporation so offending to forfeit its charter, and the court trying the cause shall forfeit the charter of said corporation upon proof that a person has been appointed receiver of its property situated in this state who is

not qualified to act under the provisions of this section. [Amendment March 19; July 6, 1889, §2; 21 Leg. p. 55.]

**ART. 1466. Application of money by receiver.**

All moneys that come into the hands of a receiver as such receiver shall be applied as follows: First, to the payment of all court costs of the suit; second, to the payment of all wages of employes due by the receiver; third, to the payment of all debts due by the receiver for materials and supplies purchased during the receivership by the receiver for the improvement of the property in his hands as receiver; fourth, to the payment of all debts due for betterments and improvements done during the receivership to the property in his hands as such receiver; fifth, to the payment of all claims and accounts against the receiver on contracts made by the receiver during the receivership, and for all claims for stock and personal injury claims against said receiver accruing during said receivership, and all judgments rendered against said receiver for personal injuries and for stock killed; sixth, all judgments recovered against the person or persons or corporations in suits brought before the appointment of a receiver in the action. And said claims shall have a preference lien on all of the moneys coming into the hands of the receiver which are the earnings of the property in his hands, and the court shall see that the money coming into the hands of the receiver as earnings of the property in his hands is paid out on the claims against said receiver in the order of their preference as named above, and it shall be the duty of the receiver to pay the funds in his hands which are the earnings of the property while in his hands as receiver on the claims against him in the order of preference named above.

**JUDGMENTS ENTITLED TO PREFERENCE LIEN.** All judgments recovered against a receiver for cause of action arising during the receivership shall be a preference lien upon all the property in his hands as such receiver superior to the mortgage lien.

**SUIT NOT ABATED BY DISCHARGE OF RECEIVER.** And if a receiver is discharged pending suits against him for causes of action growing out of and arising during the receivership, the cause of action shall not abate, but may be prosecuted to final judgment against the receiver, and the plaintiff in the action may, if he sees proper, make the party or corporation to whom the receiver has delivered the property that was in his hands as receiver, a party to the suit, and if judgment is finally rendered in favor of the plaintiff against the receiver, the court shall also enter up judgment in favor of the plaintiff against the party to whom the property was delivered by the receiver.

**EXECUTION ISSUED AGAINST RECEIVER.** If any person should sue a receiver and obtain judgment against such receiver, and said

receiver shall have in possession moneys subject to the payment of said judgment, and the plaintiff owning the judgment shall apply to the court appointing the receiver for an order to pay said judgment, and if the court appointing the receiver should refuse to order said judgment paid, when there is money in the hands of said receiver subject to the payment of the judgment, then it shall be the duty of the court rendering the judgment to order an execution to issue on said judgment against said receiver upon the filing by the plaintiff in the court where the judgment was rendered an affidavit stating the facts that the plaintiff had applied to the court appointing the receiver for an order for said receiver to pay said judgment, and that it was proven to the court that there was money in the hands of the receiver at that time which was subject to the payment of the judgment, and that the court appointing the receiver refused to order the receiver to pay the judgment; said execution, when so issued, shall be levied upon any property in the hands of the receiver, and shall be sold as under ordinary executions, and a sale of the property will convey the title of the same to the purchaser.

**PROPERTY REMAINS SUBJECT TO LIEN OF JUDGMENTS.** All judgments rendered against a receiver for causes of action arising during the receivership shall be a lien upon all of the property in the hands of the receiver superior to the mortgage lien; and if the property should be turned back into the possession of the party or corporation who were owning same at the time of the appointment of a receiver or any one else for them, or as their assigns or purchasers, the party or corporation so receiving said property from said receiver shall take said property charged with all of the unpaid liabilities of the receiver occurring during the receivership to the value of the property delivered by the receiver.

**PERSON TO WHOM PROPERTY IS DELIVERED BECOMES LIABLE FOR DEBTS.** If a receiver is discharged by the court before all of the liabilities of the receiver arising during the receivership are settled in full, then the person, persons or corporation to whom the receiver delivers the property that was in his hands as receiver shall be liable to the persons having claims against said receiver for the full amount of the liabilities.

**SUIT NOT ABATED, ETC., BY DISCHARGE OF RECEIVER.** The discharge of a receiver shall not work an abatement of the suit against a receiver, nor shall it in any way effect the right of the party to sue the receiver if he sees proper.

**JUDGMENT AGAINST RECEIVER HAS PREFERENCE LIEN.** All judgments rendered against a receiver on causes of action arising during the receivership shall be a lien on all of the property in the hands of said receiver superior to the mortgage lien.



**PARTIES RECEIVING BACK OR PURCHASING PROPERTY LIABLE FOR DEBTS.** All parties and corporations whose property has been placed in the hands of a receiver by order of court, and which was not sold by the receiver, and which property has been redelivered back to the original parties or corporation without any sale of said property, shall be liable and held to pay all of the unpaid liabilities of the receiver in causes of action arising out of and during the receivership; and if there are any suits pending against a receiver at the date of discharge, on causes of action arising during the receivership, the plaintiff shall have the right to make the party or corporation to whom the receiver delivered the property which was in his hands as receiver a party defendant along with the receiver; and if any judgment is rendered against the receiver for causes of action arising out of and during the receivership, then the court shall also at the same time (if the party or corporation receiving back the property have been made party defendants) render judgment in favor of the plaintiff against both defendants for the amount so found for plaintiff and all costs, and plaintiff shall have the right to foreclose his lien on the property delivered back by said receiver to said party or corporation.

**UNPAID JUDGMENTS AND CLAIMS NOT SUED ON HAVE A PREFERENCE LIEN.** If at the date of the discharge of the receiver there are any judgments or claims not sued on against a receiver arising during the receivership, and which judgments and claims not sued on are unpaid at the date of the discharge of said receiver, said unpaid judgments and unpaid claims not sued on shall be a preference lien on all of the property that was in the hands of the receiver superior to the mortgage lien, and the person or corporation to whom the receiver has delivered the property that was in his hands as receiver, shall be liable for all unpaid judgments and unpaid claims not sued on to the value of the property that was delivered by the receiver to said person or corporation.

**RECEIVER AND PERSON TO WHOM PROPERTY IS DELIVERED MAY BE JOINTLY SUED.** And any person having a claim against a receiver not sued on at the date of the discharge of the receiver, shall have the right to sue said receiver either alone or jointly with the person or corporation to whom the receiver delivered said property that was in his hands as such receiver; and if any judgment is rendered against said receiver, a judgment shall also be rendered against the person or corporation for the same amount that is rendered against the receiver, not to exceed the value of the property so received by said person or corporation.

**APPEAL, ETC., PERFECTED, HOW.** From and after the passage of this act, in any case in which any receiver is sued in any of the courts of this state, and such receiver desires to take an appeal

from any judgment which may be rendered against him in any justice's or county court, or to take an appeal or writ of error from any judgment which may be rendered against him in any district court, before such appeal or writ of error shall be perfected or allowed, such receiver shall enter into bond with two or more good and sufficient sureties, to be approved by the clerk of the court or justice of the peace, payable to the appellee or the defendant in error, in a sum at least double the amount of the judgment, interest, and cost, conditioned that such receiver shall prosecute his appeal or writ of error with effect; and in case the judgment of the court to which such appeal or writ of error be taken shall be against him, that he will perform its judgment, sentence or decree, and pay all such damages and costs as said court may award against him. In the event that the judgment of the court to which such appeal or [writ of] error is taken shall be against such receiver, judgment shall at the same time be entered against the sureties on his said bond, and execution thereon may issue against such sureties within twenty days after the rendition of such judgment. [Amendment March 19; July 6, 1889, §6; 21, Leg. p. 55.]

**ART. 1468. Suits by and against receiver, brought how.**

(1.) When a receiver appointed by a federal court resigns during the pendency of a suit brought against him under permission of the court appointing him, it is not necessary to obtain permission to prosecute the suit against his successor in the receivership. Even were it otherwise the failure to obtain a renewal of the consent would not constitute such error as would authorize the reversal of a judgment rendered against such receiver, in the absence of exceptions urged in proper time and manner, and in the absence of a proper assignment of error. *Fordyce v. Dixon*, 70 T. 694.

(2.) In a suit against a receiver appointed by the federal court for damage, it is error for the district court to prescribe the particular funds out of which judgment should be paid. The judgment should be against the receiver in his official capacity, leaving the matter of its enforcement to be determined by the court having jurisdiction of the receivership, in view of the rights of all persons interested in the proper application of the fund in the custody of that court. *Brown v. Brown*, 71 T. 355.

**APPOINTMENT OF AUDITORS.**

**ART. 1471. Auditor, appointed when.**

(1.) When the suit involves a settlement of mercantile accounts running through a long period of time, and the transactions of a mercantile business conducted first by the testator, and then by his executor, against whose estate a recovery is sought, for an alleged maladministration of the assets, the appointment of an auditor is not only proper, but necessary. The duties of the auditor, when appointed, should as nearly as possible be confined to a statement of the account, and as far as practicable disputed questions of fact should not be referred to him. *Dwyer v. Kalteyer*, 68 T. 554.

(2.) The accounts between the parties were referred to auditors by consent of parties, and upon the coming in of their report plaintiff filed exceptions to it, which were overruled by the court. The first and second grounds of objection to the report are that the auditors assumed to act as a court and jury, and that "they say they tried to arrive at a just solution of disputed issues and accounts which they had no authority to do." In this particular the action of the auditors was regular. As to the matter submitted to them by the court (which embraced the accounts of both plaintiff and defendant as set forth in their pleading), it was their duty to endeavor to arrive at a just solution and to report their conclusions

to the court. In doing this it was incumbent upon them to hear and determine the evidence as a jury would. If a dispute arose as to the law applicable to any particular, and they were not instructed by the court upon it, it was not improper for them to state what they supposed the law to be and their conclusion of fact upon the hypothesis that their opinion of the law was correct. If correct, their findings of fact were conclusive if not excepted to, but if not correct, they should have been disregarded by the court. *Richie v. Levy*, 69 T. 133.

**ART. 1472. Report verified by affidavit.**

(1.) It is no objection to an auditor's report, when he states his conclusion of law based on facts which he states, that he fails to state the evidence adduced to establish such facts. *Richie v. Levy*, 69 T. 133.

**ART. 1473. Reports admitted in evidence.**

(1.) The report of an auditor to which no valid objections exist may be used in evidence on the trial. Cases which have recently come before this court lead us to think that the manner of excepting to an auditor's report is not universally understood by the profession in this state. The practice was very fully and clearly discussed in *Whitehead v. Perie*, 15 T. 7, and the ruling in that case has been uniformly followed ever since. Article 1473 is recognized in *Barkley v. Tarrant County*, 53 T. 251, as affirming the rule established by judicial construction, and not as changing it. When the report of an auditor is regularly made after a proper hearing and determination of the account, a party who desires to contest one or more of its items must do so by timely and specific exceptions to the several particulars of debit or credit, which he claims to have been included or excluded from the account as reported, or which being included, he claims to be incorrect as to amount. The rule is not difficult of compliance, and operates most beneficially by relieving a litigation over long and complicated accounts of the items about which there is no dispute, and restricting it to such matters as are really in issue between the parties. [*Dwyer v. Katterer*, 68 T. 554.] *Richie v. Levy*, 69 T. 133.

**SUBSTITUTION OF LOST RECORDS AND PAPERS.**

**ART. 1475. Lost records and papers supplied on motion.**

(2.) No judgment by default can be entered in a case where the petition setting forth the cause of action has been substituted, with no notice given either to the defendant or to any one authorized to represent him, and this without regard to whether the defendant has been injured by the judgment or not. *Watson v. Miller Bros.*, 69 T. 175.

## **TITLE 30.—COURTS, CRIMINAL DISTRICT.**

ARTS. 1482 to 1508. See Civil Statutes.

## TITLE 31.—COURTS, COMMISSIONERS'.

### CH. 1.—ORGANIZATION.

ARTS. 1509 to 1513. See Civil Statutes.

### CH. 2.—POWERS AND DUTIES.

ART. 1514. Certain powers of the court specified. <i>Annotated.</i>	ART. 1517. Tax shall not be levied, except, etc. <i>Annotated.</i>
1515. Power to levy tax. <i>Annotated.</i>	1517a to 1524. See Civil Statutes.
1515a, 1516. See Civil Statutes.	

ART. 1514. Certain powers of the court specified.

(3.) It cannot be permitted to a party suing upon a contract made with the county, entered upon the minutes of the commissioners' court, to prove by parol an additional stipulation adding to or varying the effect of the minutes entry of the contract.

In order to reform an instrument for a mistake, so as to embody in it additional terms and enforce it as reformed, it should be alleged and proved that the instrument does not express the terms of the contract as agreed upon, and that both parties were ignorant of the omission at the time it was executed.

If the entry of the contract did not express the agreement, the parties should have had the entry corrected by motion and before acting upon it. *Gano v. Palo Pinto County*, 71 T. 99.

While the Constitution, Art. 7, Sec. 6, vests title in the respective counties as to the county school lands, it declares that it is alone in trust for the benefit of the public schools in the counties respectively. As such they may sell or dispose of them in such manner as the county commissioners' court may determine.

The county commissioners may select such agents as may be necessary to assist them in the discharge of their duties; such as subdividing and classifying the lands for sale, and such agents must necessarily exercise judgment and discretion in the performance of the work entrusted to them; but they have no authority to employ others to perform their duties. *Palo Pinto County v. Gano*, 60 T. 249; *Gano v. Palo Pinto County*, 71 T. 99.

ART. 1515. Power to levy tax.

(1.) An order of a commissioners' court relied upon to show a levy of the general county tax read as follows: "It is ordered and decreed by the court that the assessor be, and he is hereby, instructed to assess all taxes, that he is authorized to assess for the county, at one-half of the amount he assesses for the state; and the sheriff is hereby authorized to collect the same according to the roll of the assessor." It was held to be a nullity. *Dawson v. Ward*, 71 T. 72.

ART. 1517. Tax shall not be levied, except, etc.

(1.) A tax levied at a called session of a county commissioners' court, or without the presence of the full membership of that court, is not levied in accordance with law, and county collectors cannot seize and sell property to enforce its collection. *Free v. Scarborough*, 70 T. 672.

### CH. 3.—TERMS AND MINUTES OF THE COURT.

ARTS. 1525 to 1528. See Civil Statutes.

### CH. 4.—MISCELLANEOUS PROVISIONS.

ARTS. 1529 to 1532. See Civil Statutes.

## TITLE 32.—COURTS, JUSTICES'.

### CH. 1.—ELECTION AND QUALIFICATION OF JUSTICES.

ARTS. 1533 to 1538. See Civil Statutes.

### CH. 2.—POWERS AND JURISDICTION.

ART.

1539. Jurisdiction in civil cases. *Annotated.*

ART.

1540 to 1545. See Civil Statutes.

ART. 1539. Jurisdiction in civil cases.

(1.) In considering, in a collateral proceeding, the validity of a judgment rendered by a justice of the peace, it is not necessary that the transcript should show everything prerequisite to the attaching of jurisdiction. In this case it did not expressly appear from the transcript that both defendants, against whom judgment was rendered, had been cited, but there was evidence to justify a finding to that effect. *Hance v. Wharf Co.*, 70 T. 115.

### CH. 3.—TERMS OF THE COURT.

ARTS. 1546 to 1549. See Civil Statutes.

### CH. 4.—DOCKETS, BOOKS AND PAPERS.

ARTS. 1550 to 1555. See Civil Statutes.

### CH. 5.—VENUE.

ARTS. 1556 to 1565. See Civil Statutes.

### CH. 6.—SECURITY FOR COSTS.

ART. 1566. See Civil Statutes.

### CH. 7.—PARTIES.

ART. 1567. See Civil Statutes.

### CH. 8.—PROCESS AND SERVICE.

ART.

1568 to 1571. See Civil Statutes.

ART.

1572. Rules of district courts, etc., govern as to issuance and service of process. *Annotated.*

ART. 1572. Issuance and service of process.

(2.) Construing articles 1572, 1617, 1659 and 152, of the Revised Statutes, *Act*, that service may be obtained by publication in suits instituted in the court of a

justice of the peace, under the same rules and restrictions that apply in district courts.

To effect service by publication, the citation must be published, and should be made for full twenty-eight days—once in each week for four weeks. *Davis v. Robinson*, 70 T. 394.

## CH. 9.—PLEADINGS.

ART.

1573. Pleadings oral, etc. *Annotated.*

ART.

1574, 1575. See Civil Statutes

ART. 1573. Pleadings oral, etc.

(3.) A counter-claim cannot be set up in the district court by a defendant in a cause appealed from a justice's court which was not set up in the justice's court. If the counter-claim exceeded the jurisdiction of a justice of the peace, that fact affords no ground for entertaining it, when urged for the first time in the district court; in a case originating before a justice of the peace. The defendant must resort to a suit before some court having jurisdiction of the amount claimed for the enforcement of his rights. *Boudon v. Gilbert et al.*, 67 T. 680.

(4.) When the record showed affirmatively that there were no pleadings made by the defendant in a suit for debt before a justice of the peace, it was error on appeal to hear evidence of payment.

It would seem that the record would be sufficient to show the pleadings in a justice's court, if there appeared therein the brief statement required by the statute, either from the transcript of the justice's docket or that of the district court (when that court obtained jurisdiction), or by entry upon the minutes of the latter court, either independent of, or in the judgment itself. *Moore v. Jordan et al.*, 67 T. 394.

## CH. 10.—CONTINUANCE.

ART. 1576. See Civil Statutes.

## CH. 11.—APPEARANCE AND TRIAL.

ARTS. 1577 to 1585. See Civil Statutes.

## CH. 12.—TRIAL BY JURY.

ARTS. 1586 to 1610. See Civil Statutes.

## CH. 13.—THE JUDGMENT.

ART.

1611, 1612. See Civil Statutes.

1613. Requisites of judgment. *Annotated.*

ART.

1614 to 1620. See Civil Statutes.

ART. 1613. Requisites of judgment.

(4.) Under the statutes in force in 1875, it was not necessary that a justice of the peace should award execution as a part of the judgment for debt, in order to

authorize the issuance of execution. The writ issued on the judgment without reference being made thereto, and when the judgment was against an independent executor, the fact that by its terms it required the amount recovered to be paid in due course of administration, was immaterial. Its payment could be enforced by execution issued after the adoption of the Revised Statutes, if the judgment was rendered prior to that time. *Roberts v. Connelley*, 71 T. 11.

## CH. 14.—NEW TRIALS, ETC.

ARTS. 1621 to 1626. See Civil Statutes.

## CH. 15.—EXECUTION.

ARTS. 1627 to 1635. See Civil Statutes.

## CH. 16.—STAY OF EXECUTION.

ARTS. 1636, 1637. See Civil Statutes.

## CH. 17.—APPEAL.

ART.  
1638. Appeal may be taken. *Anno-*  
*tated.*  
1638a. See Civil Statutes.

ART.  
1639. Notice of appeal-bond filed,  
when. *Annotated.*  
1639a to 1641. See Civil Statutes.

ART. 1638. Appeal may be taken.

(2.) The county court has jurisdiction of an appeal by defendant against whom judgment has been rendered on a counter-claim for an amount above twenty dollars, though the amount sued for by the plaintiff was less than twenty dollars. *Roberts v. McCamant*, 70 T. 743.

ART. 1639. Appeal-bond when and how filed; notice to be given.

(3.) If a motion for a new trial has been filed within five days after the rendition of judgment by a justice's court, but no action has been had thereon within ten days after the rendition of the judgment, such motion should be considered as overruled on the tenth day after the date of the judgment, and a party would, in such case, have ten days thereafter within which to file his appeal-bond. *Jones et al. v. Collins*, 70 T. 752.

(15.) When the jurisdiction of the county court properly attaches in an appeal from the judgment of a justice of the peace, the voluntary dismissal of the appeal operates to avoid the judgment of the justice of the peace. If, however, no appeal from the original judgment lies, or if the law regulating appeals has not been complied with, the judgment of the justice of the peace remains in force after an entry dismissing the appeal. If the judgment of the county court dismissing the appeal recites that it was because it had no jurisdiction, that judgment is conclusive until set aside, and estops the party complaining from attacking its validity in a collateral proceeding. Unless properly set aside, the justice of the peace may issue execution on the judgment, but not for the costs incurred in the appeal. *Roberts v. McCamant*, 70 T. 743.

## CH. 18.—GENERAL PROVISIONS.

ARTS. 1642 to 1644. See Civil Statutes.

## TITLE 32a—DENTISTRY.

**ART. 1644a. (New.)**

- §1. Dentist shall obtain license to practice.
- §2. Board of examiners; appointment and term of office.
- §3. Organization of board of examiners.
- §4. Annual meetings of board.
- §5. License granted, how.
- §6. Names of licentiates to be registered.
- §7. Transcript from register, evidence.

**ART. 1644a. (New.)**

- §8. Quorum; adjournments.
- §9. Temporary license granted.
- §10. Practice of dentistry without license a misdemeanor.
- §11. Fines appropriated to county school fund.
- §12. License shall be recorded, when and where.
- §13. Burden of proof in criminal proceedings.
- §14. Conflicting laws repealed.

**ART. 1644a. §1. Dentist shall obtain license to practice.**

From and after the passage of this act it shall be unlawful for any person to engage in the practice of dentistry in the State of Texas, unless said person has obtained license from a board of examiners, duly appointed and authorized by this act to issue such license; *provided*, that dentists who have been in the regular practice of dentistry in this state for three years next preceding the passage of this act, shall not be required to submit to an examination, and shall be entitled to a license without fee, which shall be transmitted to him by mail or otherwise, upon his application, accompanied by satisfactory evidence to the fact of his having been in the regular practice for the time required.

**§2. Board of examiners; appointment and term of office.**

The board of examiners shall be appointed by the judge of each judicial district, and shall be composed of three reputable dentists residing in said district, who shall hold their offices two years from the date of appointment, and any vacancy shall be filled by the district judge as aforesaid.

**§3. Organization of board of examiners.**

The board shall immediately after appointment select one of their number as president, and one as secretary, and adopt all rules necessary for the transaction of the business that may come before them.

**§4. Annual meetings of board.**

Said board shall meet annually at some central point in their respective districts to conduct examinations and grant licenses. Notice of the time and place of such meeting shall be given for one month by publication in some newspaper published in the district.

**§5. License granted, how.**

Any applicant who shall furnish satisfactory evidence of having graduated and received a diploma from any reputable dental college, and any applicants under the provisions of the first section of this act, and all other applicants who undergo a satisfactory examination as to their qualifications and shall pay to the said board a fee of five dollars, to be used for the advertising and incidental expenses, shall be granted license, which license shall entitle the person to whom granted to practice dentistry in any county, where the same has been recorded as required by section 12.



**§6. Names of licentiates to be registered.**

Said board shall keep a book, in which shall be registered the names of all persons licensed to practice dentistry by said board.

**§7. Transcript from register, evidence.**

The book so kept shall be a book of record, and a transcript from it, certified to by the officer who has it in keeping, with the common seal of said board, shall be evidence in any court in this state.

**§8. Quorum; adjournments.**

Two members of said board shall constitute a quorum for the transaction of business, and should a quorum not be present on the day appointed for its meeting, the member present may adjourn from day to day until a quorum be present.

**§9. Temporary license granted.**

One member of said board may grant a license for an applicant to practice, until the next regular meeting of the board, when he shall report the fact, at which time such temporary license shall expire, but such temporary license shall not be granted by a member of the board within one year after the board has rejected the applicant.

**§10. Practice of dentistry without license a misdemeanor.**

Any person who shall, in violation of the provisions of this act, practice dentistry in this state for a fee or reward, shall be liable to indictment, and on conviction shall be fined not less than one hundred nor more than two hundred dollars; nor shall it be construed to prevent persons from extracting teeth, nor in any way interfere with physicians and surgeons in their practice as such.

**§11. Fines appropriated to county school fund.**

All fines collected from prosecutions under this act shall be appropriated to the common school fund in the county where collected.

**§12. License shall be recorded, when and where.**

Every person to whom license is issued by said board of examiners shall, within thirty days from the date thereof, present the same to the clerk of the county in which he resides, who shall officially record said license in a book in his office and shall be entitled to demand a fee of fifty cents for his services, but a temporary license issued under section 9 of this act need not be recorded.

**§13. Burden of proof in criminal proceedings.**

On the trial of any person indicted under the provisions of this act, it shall be incumbent upon the defendant, in order to exempt him from the penalties of this act, to show that he has authority, under the law, to practice dentistry in this state.

**§14. Conflicting laws repealed.**

All laws or parts of laws in conflict with this act be, and the same are hereby, repealed. [Act March 27; July 6, 1889; 21 Leg. p. 90.]

## TITLE. 33.—DESCENT AND DISTRIBUTION.

## ART.

1645. Where intestate leaves no husband or wife. *Annotated.*1646. Where intestate leaves husband or wife. *Annotated.*

## ART.

1647 to 1657. See Civil Statutes.

1658. Alienage no bar. *Annotated.*

## ART. 1645. Where intestate leaves no husband or wife.

(1.) A grant of land by the Republic of Texas to the heirs of one who fell at the Fannin massacre, enured to the benefit of such only as were heirs under the laws in force at the time of the death. *Wardlow v. Miller*, 69 T. 395.

(3.) Under the civil law, in force in Texas in 1836, the brothers and sisters of the full blood and children of brothers or sisters of a deceased brother or sister of the full blood inherited the estate to the exclusion of brothers or sisters of the half blood. *Wardlow v. Miller*, 69 T. 395.

(10.) The only class of persons who primarily inherit, on the death of a person, every species of property of which he may die seized, whether it be separate or community, are his children; the wife can take no interest in his community estate if they survive him, and if they or their descendants survive, no collateral or person in the ascending line can inherit any portion of his estate.

The interest of an adopted heir in the estate of the person adopting him vests, on his death, without reference to whether children have been born in lawful wedlock or not; his heirship entitles him to an interest according to the terms of the statute in both the separate and community estate, and he stands, as to his right of inheritance, on the same plane with children born in lawful wedlock, though restricted as to the proportion of property he may take by the statute, *provided*, a child survive begotten in lawful wedlock.

An adopted heir cannot be postponed in his inheritance to any class of persons who are not themselves heirs; if there be no children begotten in lawful wedlock, his relation to the deceased is in contemplation of law that of the child, and he inherits as such.

Our statute prescribing the rights of an adopted heir modifies the law of Spain on that subject, in so far as his rights are concerned, in that he cannot inherit under the civil law if his adopter has a legitimate child living. The statute of Texas confers on the adopted heir the rights of a child only with reference to the estate, and does not constitute him a member of the family of his adopter and invest him with the privileges and duties peculiar to the relation of parent and child, as does the civil law. *Eckford and Wife v. Knox*, 67 T. 200.

(11.) The surviving wife has no authority, as such, to make a contract for the location of a land certificate, the community property of herself and of her deceased husband, whereby a portion of the land secured by the certificate is given to the locator, that will bind the interest inherited by the children of the deceased husband.

If one whose community interest in land inherited from a deceased father has been, in part, illegally bartered away by the mother, who also owned a half interest, shall, upon reaching his majority, sell by metes and bounds less than his half interest, and adopt a divisional line formerly established as a partition by the mother, dividing the land in half, he thereby ratifies the partition line, but his sale of the exact quantity that would have been left him had the sale by his mother been valid, will not estop him from asserting right to the residue to which he was of right entitled. *Stone v. Ellis*, 69 T. 325.

## ART. 1646. Where intestate leaves husband or wife.

(1.) Under the statute of December 18th, 1837, the wife only inherited from the husband when he left no children, and under the Spanish law, in force in 1838 in Texas, the widow who has not sufficient means to live with the comforts to which she was accustomed, was entitled to one-fourth part of the estate of her deceased husband, not to exceed a certain amount. This was forfeited upon her marrying again. *Boone v. Hulse*, 71 T. 176.

## ART. 1658. Alienage no bar.

(6.) A colonist who, in 1831, received a grant of land in Texas, and took the oath of allegiance, became a naturalized citizen, with all the rights of property and of person which he could have were he "native here and to the manor born."

The minor daughter of a colonist, though never in Texas, is not an alien, even if living in an alien country, but capable of inheriting from him, and entitled to share with his other children and his widow in the distribution of his estate.

The citizenship of the father is that of the child so far as the laws of the country of which the father is a citizen is concerned, and the domicile of the minor child is that of the father. He being in Texas, his minor children, no matter where they may be, are citizens of, and have their domicile in, Texas also. At the death of the father, his domicile remains that of the children. Minors cannot change their domicile or acquire another until they become persons *sui juris*. *Franks v. Hancock*, 1 U. C. 554.

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## TITLE 34.—ELECTIONS.

### CH. 1.—TIME AND PLACE OF HOLDING ELECTIONS.

ART.  
1659 to 1663a. See Civil Statutes.  
1664. City wards. *Amendment*.

ART.  
1665, 1666. See Civil Statutes.

#### ART. 1664. City wards.

In each incorporated city, town, or village, each ward shall constitute an election precinct; *provided*, that the commissioners' court of the several counties may and it shall be their duty to divide any ward of any city or town into as many election precincts as they may deem proper; *and, provided further*, that towns and villages incorporated in accordance with chapter 11, of title 17, shall not necessarily constitute a separate election precinct, except in elections pertaining solely to the affairs of said towns and villages. [Amendment February 12, 1889; 21 Leg. p. 10.]

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### CH. 2.—OFFICERS OF ELECTIONS.

ARTS. 1667 to 1678. See Civil Statutes.

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### CH. 3.—ORDERING ELECTIONS.

ARTS. 1679 to 1686. See Civil Statutes.

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### CH. 4.—SUFFRAGE.

ARTS. 1687 to 1692. See Civil Statutes.

### CH. 5.—MANNER OF HOLDING ELECTIONS, ETC.

**ART.**  
1693, 1693a. See Civil Statutes.  
1694. Poll lists, and manner of receiving and numbering votes. *Annotated.*

**ART.**  
1695 to 1697. See Civil Statutes.  
1698. Returns of election, how and to whom made. *Annotated.*  
1699 to 1718. See Civil Statutes.

**ART. 1694. Poll Hsts, and manner of receiving and numbering votes.**

(1.) It must be held in favor of the right of suffrage, that the statute regulating the character of ballots that may be used at an election should be strictly construed, and words printed on the face of a ticket, other than those allowed by the terms of the law, will not vitiate it if they do not amount to a device or mark within the meaning of the statute. The printing of the name of the political party to which the candidate belongs will not vitiate the ticket. Nor is it vitiated by the fact that at a general election the names of more than one political party are found on the ticket above the names of the candidates who belong, respectively, to such parties. *Williams v. The State*, 69 T. 368.

**ART. 1698. Returns of election, how and to whom made.**

(1.) The original returns of election are admissible, in a case of contested election, as *prima facie* evidence of the truth of what they contain, when produced from the custody of the county clerk, in whose office they were deposited by the managers of the election. *Williams v. The State*, 69 T. 368.

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### CH. 6.—CONTESTING ELECTIONS.

**ARTS. 1719 to 1753.** See Civil Statutes.

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### CH. 7.—MISCELLANEOUS PROVISIONS.

**ARTS. 1754 to 1759.** See Civil Statutes.

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## TITLE 35.—ELECTION OF PRESIDENT AND VICE-PRESIDENT.

**ARTS. 1760 to 1769.** See Civil Statutes.

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## TITLE 36.—ESCHEAT.

**ARTS. 1770 to 1788.** See Civil Statutes.

## TITLE 37.—ESTATES OF DECEDENTS.

## CH. 1.—JURISDICTION.

ART.

1789. Jurisdiction of county court.

*Annotated.*

1790, 1791. See Civil Statutes.

ART.

1792. In what counties wills probated.

*Annotated.*

1793. See Civil Statutes.

## ART. 1789. Jurisdiction of county courts.

(7.) When a court of record of general jurisdiction over all matters pertaining to the estates of deceased persons has assumed to exercise jurisdiction in a given case, all presumptions are in favor of the validity of its proceedings; and if the record of such a court shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, then its judgment, order or decree must be held conclusive in any other court of the same sovereignty, when collaterally attacked.

When a person dies, leaving to the jurisdiction of the probate court an estate, then, and not before, the court has power to inquire and determine the existence or non-existence of every fact necessary to be determined in ascertaining whether it has jurisdiction in the particular case, and the extent to which it ought to be exercised.

Such a court must determine the existence of the facts which make it proper that administration should be granted in the county in which the court sits; if it comes to an erroneous conclusion, and orders the issuance of letters of administration, its judgment is voidable and not void.

[*Blair v. Cisneros*, 10 T. 35; *Fisk v. Norvel*, 9 T. 15; *Boyle v. Forbes*, 9 T. 36; *Wardrup v. Jones*, 23 T. 489; *Cochran v. Thompson*, 18 T. 652; *Merriweather v. Kennard*, 41 T. 273; *Duncan v. Veal*, 49 T. 604. reviewed.]

When the judgment or decree of a court of general jurisdiction is attacked collaterally, it must be deemed valid, unless it appears that no facts could have been shown which could render it so.

The act of March 20th, 1848, did not fix any period after which administration should not be opened, and the courts cannot legislate by fixing an arbitrary period. [*Ricard v. Williams*, 7 Wheaton, 115, and *McFarland v. Stone*, 17 Vermont, 173, cited and reviewed.]

A decedent died in 1852. Over fourteen years afterwards letters of administration were granted on his estate, under which lands were sold. The letters were granted on a petition, which stated that his principal estate was in the county where the application for letters was made, and that he died in another county. Over ten (10) years afterwards the heirs brought suit to set aside the sale for the alleged want of jurisdiction in the probate court to order it; for fraud and collusion between the administrator and the purchaser, who presented the claims under which the land was sold; because the deceased had his residence, when he died, in a county other than the one in which the estate was administered, and that his principal estate was in the county of his residence; because the administration was taken out for the fraudulent purpose of acquiring title to the land, and that all claims against the estate were barred before the letters of administration were granted. The suit being an original proceeding in the district court by the heirs to declare the administration a nullity for want of jurisdiction; to set aside the sales and deeds for fraud; to recover the land, and to remove cloud from title, *held*:

1. The grant of letters cannot be held void in such a proceeding by the district court, and it cannot inquire whether, on the ground claimed, the action of the probate court in granting letters was erroneous.

2. A different doctrine would destroy the safeguards for purchasers at sales ordered by courts invested with power to decide when sales shall be made, and when they have been legally made; and would lead to the sacrifice of estates by destroying confidence in such sales.

3. Though claims against an estate were presented to and approved by the court, which were at the time manifestly barred by the statute of limitations, that approval stands as a judgment which cannot be collaterally attacked.

4. But if the claims were fraudulent, and the land was sold to satisfy them by order of the probate court, and the pretended creditor who presented the claims became the purchaser, a court of equity would have power in an independent proceeding to act directly on the purchaser, while the apparent title still remained in him, to prevent his reaping benefit from his fraud, and wrest from him the title thus fraudulently obtained. [On this point *Poor v. Boyce*, 12 T. 449; *Dancy v. Stricklinge*, 15 T. 564, and *George v. Watson*, 19 T. 369, approved.]

5. No relief can be afforded, even by a court of equity, against one who has purchased the land from such fraudulent purchaser, for value, and without notice of his fraud.

6. If the period which would bar debts is to be deemed the period after which administration cannot be legally granted (when not regulated by statute), then the courts ought not, in a collateral proceeding, to declare an administration void, if granted within ten years, which, in Texas, is the longest period of limitation.

7. Whenever, in a collateral attack upon an administration, it has been judicially held that an administration was a nullity, unless some fact was shown when letters were granted, the word *nullity* is to be construed as equivalent to the word voidable, for if there were a fact or facts, proof of which would have made the administration valid, it cannot be void, and the legal presumption is that the very fact which would give validity was pressed before the court which granted the administration. *Martin et al. v. Robinson et al.*, 67 T. 368.

#### ART. 1792. In what counties wills probated.

(1.) In 1851 an application was made to the probate court of a county in which the decedent owned no property at his death, which occurred elsewhere, and a pretended administrator assumed to administer the estate under an order which granted administration on "this estate," without specifying the name, but which was attached to a list of fourteen estates, that of the decedent being one of them. The decedent fell at the massacre of the Alamo, and the letters of administration were issued fifteen years afterwards. Land represented as being located in another county, under the headright, bounty and donation certificates, was ordered to be sold, and was sold, as quickly as the forms of law permitted to pay the cost of the court (sixty dollars), and the county clerk (W. R. Baker) purchased it. The bounty certificate was not located on the land sold until eight months after the sale. In a suit involving the validity of the administration and sale, *held*:

1. There was no valid order granting letters of administration; had there been, it would have been void.

2. Had the order granting administration been valid, the order of sale and confirmation of sale of land not then appropriated by location would have passed no title. *Harwood v. Wylie*, 70 T. 538.

(2.) The probate courts of Texas have jurisdiction over the assets of a non-resident, who, dying at his domicile, leaves credits in this state. [*Jones v. Jones*, 15 T. 465; *Green v. Rugely*, 23 T. 539.]

The laws of the domicile direct and control the distribution of the movable property of the intestate; but when the jurisdiction of a court other than that of the domicile has been invoked in the administration, such administration is governed in its proceedings, in its beginning, progress and close, by the laws of the country granting such letters; and administration in Texas cannot be controlled in its mode of collecting the assets of an estate by the courts of the domicile of the deceased. [*Wilkins v. Ellet*, 9 Wallace, 740; *Story's Con. L.*, 509-513, 514, 516, 518; *Pas. Dig.*, 5490.] *Simpson v. Knox*, 1 U. C. 569.

## CH. 2.—RECORD BOOKS.

ART.  
1794 to 1798. See Civil Statutes.  
1799. Shall be evidence. *Annotated.*

ART.  
1800. See Civil Statutes.

#### ART. 1799. Record books shall be evidence.

(1.) Under a statute (Early Laws, Art. 3484) requiring that official oaths of executors and administrators and all inventories of estates should be copied at

T. 37, CHS. 3, 4.] ESTATES OF DECEDENTS. Arts. 1815, 1829.

length in the records of the court, and which gave the same effect to certified copies of such record entries as original copies would have, the loss of the original inventory will not authorize parol evidence of its former existence and return, nor will such evidence be admitted to show that an executor qualified as such.

Neither will the custodian of the records be permitted to testify that a will has been duly recorded, and that the executor returned an inventory of all property belonging to the estate. *Roberts v. Connelley*, 71 T. 11.

### CH. 3.—GENERAL PROVISIONS.

ART.

1801 to 1814. See Civil Statutes.

1815. Rights, etc., of executors, etc., regulated by common law, etc. *Annotated.*

ART.

1816 to 1828. See Civil Statutes.

ART. 1815. Rights of executors regulated by common law.

(2.) A trustee or executor who purchases the estate from the *cestui que trust*, or heir, must pay therefor a full, fair and adequate consideration, and if there be any concealment as to the real value of the property, or a false or fraudulent representation as to the value thereof, the sale will be set aside.

It is said in Story's Equity Jurisprudence, vol. 1, middle page 314: "To use the expressive language of an eminent judge, a trustee may purchase of his *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a zealous and scrupulous examination of all the circumstances; and it is clear that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment and no advantage taken by the trustee of information acquired by him as trustee. But it is difficult to make out such a case, when the exception is taken, especially when there is any inadequacy of price or inequality in the bargain."

Though an estate be in course of administration by an executrix acting without bond under will, the district court, if the amount in controversy be sufficient, will have jurisdiction in a suit brought against the executrix by one of the legatees joined by her husband to set aside for fraud a deed made by such a legatee to the executrix. *Hickman v. Stewart*, 69 T. 255.

### CH. 4.—APPLICATION FOR THE PROBATE OF WILLS AND FOR LETTERS.

ART.

1827, 1828. See Civil Statutes.

1829. Administration continues until closed. *Annotated.*

ART.

1830 to 1846. See Civil Statutes.

ART. 1829. Administration continues until closed.

(2.) Suit was begun on August 11th, 1885, against one who had been appointed administrator of an estate in 1867; it was brought by one claiming a distributive share of the estate, and sought to compel an exhibit by the administrator preparatory to a suit by plaintiff for partition. The records of the probate court had been destroyed by fire, but orders of the court were shown appointing the defendant administrator, appointing appraisers of the estate, and another order, # being the last, approving an amended exhibit and decreeing a sale of lands, dated March 31st, 1869. No order showing final account or discharging the administrator was shown. *Held:*

1. The forty-sixth section of the probate act of August 15th, 1870, and Revised Statutes, Art. 1829, abrogated the rule announced in *Murphy v. Menard*, 14

T. 61; Porter v. Cummings, 14 T. 140; and Marks v. Hill, 46 T. 345; which conclusively presumed the close of administration after the periods fixed in those cases.

2. When the records of a probate court have been destroyed, it is competent to show by parol that an order of court was entered before the destruction of the record closing the administration. The entry upon the record must be shown; an order requiring such entry would not be admissible. Branch v. Hanrick, 70 T. 731.

## CH. 5.—PROBATE OF WILLS.

### ART.

1847 to 1850. See Civil Statutes.

1851. Facts which must be proved. *Annotated.*

1852. See Civil Statutes.

### ART.

1853. All testimony shall be committed to writing. *Annotated.*

1854 to 1856. See Civil Statutes.

### ART. 1851. Facts which must be proved.

(1.) The fact that a person has executed a testamentary paper in the mode prescribed by law, is ordinarily deemed sufficient evidence that the instrument speaks the language which the testator desired to use, and thereby reflects his wishes in regard to all matters of which it speaks.

When the evidence shows that a testator who was of sound mind, able to read and write, and in no way unable to acquire knowledge of the contents of a paper by exercising his natural faculties, signs a testamentary paper, and procures it to be witnessed in the mode prescribed by law, the will should be admitted to probate without further proof that the testator knew its contents, if free from suspicion regarding facts connected with its execution.

But when a paper writing, purporting to be a will, was copied from another writing made by one who by its terms was to receive a large portion of the estate (all the natural heirs being disinherited), and the testator was aged, infirm, and unable to read, the mere formal proof of the execution of the paper will not entitle it to probate. In such a case it should be shown that the testator correctly understood the contents of the paper signed by him. [On this point Hallison v. Rowan, 3 Washburn, 885; Beall v. Mann, 5 Georgia, 469, and other authorities cited in the opinion, approved.] Kelly v. Settegast, 68 T. 13.

### ART. 1853. All testimony shall be in writing.

(2.) If one interested in the probate of a will, after due notice, fails to attend and cross-examine a witness thereto when the will is probated in the county court, and the testimony of the witness is reduced to writing, he cannot on appeal object to the written evidence of the witness on the ground that he had not been cross-examined. On appeal the original written testimony of the witness, taken in the county court, may be read in evidence instead of a certified copy thereof. Beeks v. Odom, 70 T. 183.

## CH. 6.—GRANTING LETTERS.

### ART.

1867 to 1870. See Civil Statutes.

1871. Further administration granted, when. *Annotated.*

### ART.

1872 to 1876. See Civil Statutes.

### ART. 1871. Further administration granted, when.

(2.) An application for letters of administration, which alleges that a former administrator had been appointed who qualified as administrator and had died before winding up the estate, is sufficient, even if it were essential to the validity of the administration *de bonis non* that the necessity therefor should appear in the application for letters. Such a necessity, however, does not exist, since it will be presumed that the proper evidence to authorize the appointment was submitted. Williams & Co. v. Verne, 68 T. 414.



Lorenzo DeZavalla died in Harrisburg county, November 16th, 1836. His son took out letters of administration on his estate January 30th, 1838, and returned an inventory of property valued at \$15,000. Administration was kept open from year to year, and in 1841 partition of the estate was ordered. At the July term, 1841, of the probate court, the commissioners appointed to make partition reported a division of the land among the heirs, except one labor, which they represented indivisible. It was ordered sold; report of sale was made September 28th, 1841, and approved. January 2d, 1843, Henry M. Fock, who had married Zavalla's widow, applied for letters of administration *de bonis non* on Zavalla's estate, alleging that the administrator had "departed from the republic, and had been absent from the republic for more than twelve months, and that the estate is suffering from neglect." February 27th, 1843, after due publication, the former letters of administration were revoked, and Henry M. Fock was appointed administrator *de bonis non* with bond fixed at \$17,000. Fock continued to act as administrator until his death in 1850. March 12th, 1850, W. R. Baker filed a petition in the probate court showing "that Lorenzo DeZavalla died several years since a citizen of this county; that his estate has been administered and the property sold, except the headright of the deceased, and he is informed that all debts have been paid, except one due your petitioner and officers of court for expenses of administration; \* \* \* that the administrator of said estate, H. M. Fock, has lately died, leaving your petitioner's debt unpaid: that it is the wish of the widow of said deceased that said debt should be paid, and that for the purpose an administrator should be appointed." The petition was sworn to by Baker, clerk, before Augustus C. Daws, his deputy, March 13th, 1850. March 15th, 1850, Baker gave notice of his application, and at the March term, 1850, of the probate court, letters issued to Daws. April 1st, 1850, Daws returned an inventory, including only the league and labor headright certificate granted to L. DeZavalla by the board of land commissioners of Harrisburg county, appraised at \$250. Inventory approved. Daws gave \$500 bond, with Baker and T. M. Bagley sureties, which was approved April 29th, 1850. April 30th, 1850, Daws made application for order of sale to sell the certificate, for cause showing that there was "due and owing the officers of Harris county court, by the estate of L. DeZavalla, under former administrators, upwards of \$100 for costs of court, and that there are and will be costs due in addition thereto by virtue of the administration of petitioner; that there are no other debts to his knowledge, and that the headright for one league and labor of land of the deceased is all the property belonging to the estate, out of which the aforesaid debts can be made. He, therefore, prays that he be authorized to sell said land certificate, together with all the right of location which may have been acquired, for cash." Sworn to by Daws before W. R. Baker, clerk, April 29th, 1850. April term, 1850, ordered that Daws proceed to sell on first Tuesday in June, 1850, at the court-house door in Harris county, for cash, to the highest bidder, after giving twenty days' notice, "one league and labor land certificate, granted to one Lorenzo DeZavalla by the board of land commissioners of Harrisburg county, together with all the right of location which may have been acquired by virtue thereof." June 4th, 1850, return of sale by Daws, sworn to before W. R. Baker, clerk; sale to Baker for \$195 cash. June term, 1850, sale approved, and deed to purchaser ordered for the certificate, "together with the land upon which the same may be situated." Daws executed deed to Baker in accordance with the order approving the sale. In a suit by the heirs of Zavalla for the land covered by the certificate, *held*:

1. Baker's title to the land depends upon the validity of the grant of administration under which the sale was made at which he bought, and the validity of the administration depends upon the facts as they existed at the time the letters were granted. [Withers v. Patterson, 27 T. 501.]

2. Given an administration legal in its inception, it becomes immaterial to its validity whether it was wisely executed.

3. That property was lost or squandered in the course of the administration is a ground for complaint against the administrator in the probate court, or in a direct proceeding for the revision of such errors.

4. That an administration was not formally extended did not affect its validity. [Poor v. Boyce, 12 T. 447.]

5. Nor that so long a time elapsed between the death of the intestate and the grant of the letters *de bonis non*. [Howard v. Bennett, 13 T. 314.]

6. Nor that there was an interval of several years between entries or evidence of acts as such. [Burdett v. Silsbee, 15 T. 610-616.]

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7. Nor that an estate was consumed by costs and expenses to the loss or want of benefit to the heirs. [Kleinecke v. Woodward, 42 T. 311.]

8. Nor was the sale under which Baker purchased ineffectual to pass the location with the certificate. [Simpson v. Chapman, 45 T. 566.]

9. That limitation would run against an effort to avoid the sale for fraud, if fraudulent acts can be shown or appear. [Pearson v. Burditt, 26 T. 172.]

10. That Daws' administration, under which Baker purchased, was valid; that the objections to the proceedings antecedent to, and in the sale and its confirmation, were but irregularities, only available in a direct attack, and not to be avoided in a collateral proceeding. Baker v. DeZavalla, 1 U. C. 621.

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**CH. 7.—TEMPORARY ADMINISTRATION.**

**ARTS. 1877 to 1884. See Civil Statutes.**

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**CH. 8.—OATH AND BOND OF EXECUTORS AND ADMINISTRATORS.**

**ART.**

1885. See Civil Statutes.

1886. Oath of administrator. *Annotated.*

1887, 1888. See Civil Statutes.

**ART.**

1889. Bond of executors and administrators. *Annotated.*

1890 to 1904. See Civil Statutes.

**ART. 1886. Oath of administrator.**

(1.) It is no valid objection to the oath of an administrator *de bonis non* that it omits the words, "died without leaving any lawful will." The question as to whether there was a will must be presumed to have been settled prior to the issuance of the former letters. Williams & Co. v. Verne, 68 T. 414.

**ART. 1889. Bond of executors and administrators.**

(1.) The amount of the penalty which should be fixed in the bond of an administrator must be determined, not from the estimated value of the estate as set forth in the application for letters, but by the order of the court. Once fixed by the court granting administration, the presumption must obtain that the penalty specified in the bond was twice the value of the estate, as estimated by the court. Williams & Co. v. Verne, 68 T. 414.

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**CH. 9.—ISSUANCE OF LETTERS.**

**ARTS. 1905 to 1909. See Civil Statutes.**

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**CH. 10.—INVENTORY, APPRAISEMENT AND LIST OF CLAIMS.**

**ARTS. 1910 to 1929. See Civil Statutes.**

## CH. 11.—CERTAIN RIGHTS, DUTIES AND POWERS OF EXECUTORS AND ADMINISTRATORS.

**ART.**  
1930 to 1932. See Civil Statutes.  
1933. Ordinary diligence shall be used to collect claims, etc. *Annotated.*

**ART.**  
1934 to 1937. See Civil Statutes.

**ART. 1933. Ordinary diligence shall be used to collect claims.**

(3.) An administrator may properly allow without suit a credit on a claim due the estate, which he knows to be just, and that it could be established as a credit if suit were brought on the claim. *Stonebraker v. Friar*, 70 T. 202.

An administrator cannot maintain a suit to set aside a deed made by his intestate upon the ground that such deed was fraudulent as to creditors. *Wilson v. Demander*, 71 T. 603.

## CH. 12.—ADMINISTRATION UNDER A WILL.

**ART.**  
1938 to 1941. See Civil Statutes.  
1942. Testator may provide that no action be had in court, except probate of will, etc. *Annotated.*

**ART.**  
1943 to 1953. See Civil Statutes.  
1954. Executor may sell property without order of court, when. *Annotated.*  
1955 to 1958. See Civil Statutes.

**ART. 1942. No action in court, except probate of will.**

(8.) The qualification and return of inventory by one of the executors named in a will which provides for independent action under it, after return of inventory, has the effect of withdrawing the administration of the estate and the execution of the will from the control of the probate court. *Roberts v. Connallee*, 71 T. 11.

An executorship free from the control of the county court may sell any property of the estate without an order of court, when necessary for the payment of debts. *Howard v. Johnson*, 69 T. 655.

A testator, who at the time of his death was engaged in a mercantile business in San Antonio, constituted by will his sister, who resided in France, as testamentary executrix, exempting her from giving bond. By a subsequent clause he provided: "As soon as my death is assured, I will that my mercantile business shall be immediately brought to a stop, and my store closed and shut up." He charged with the duty of closing his store a friend residing in San Antonio, requiring him to make haste to secure his books and to notify his executrix. *Held*:

1. That the requirement to stop the mercantile business and close the store was provisional, and was not intended to direct the closing of the store and suspension of the mercantile business beyond the period when the executrix should arrive and undertake the discharge of the trust.

2. The executrix thus exempt from giving bond, or her successor, being in like manner exempt under the provisions of the will, had the right to continue the mercantile business of the testator, if thought best for the interest of the estate.

3. If the executor determined that the interest of the estate required that the mercantile business be continued, he was not liable for losses that resulted therefrom if he exercised a reasonable discretion in discharging the trust. *Dwyer v. Kalteyer*, 68 T. 554.

**ART. 1954. Executor may sell without order of court, when.**

(3.) A will conveyed the property of the deceased to three trustees, who were also named as independent executors, in trust as follows: "First, that they shall pay out of the whole estate all my just debts." But one of the three executors qualified, who, after selling a tract of land, died; and this suit was brought by the administrator *de bonis non* against the purchaser to recover the land, remove cloud from title, and to recover rents. *Held*:

1. In *Blanton v. Mayes*, 58 T. 424, there was nothing in the facts presented to show that the estate owed debts.

2. That decision did not announce that the executor who qualified was not authorized to sell property of the estate to pay debts, unless he did so under an order of the probate court in course of regular administration.

3. Under the provisions of the will the executors had the apparent, if not the real, power to do every act which an executor administering an estate under will free from the control of the probate court may ordinarily do.

4. The purchaser, having bought in good faith, was entitled to recover back the money he paid for the land, and which was applied to the benefit of the estate, or the beneficiaries under the will. [Citing *Howard v. North*, 5 T. 816; *Hernndon v. Rice*, 21 T. 456, and *Walker v. Lawler*, 45 T. 538.]

5. The right to recover back the money involves the right to recover interest thereon, and also money expended by the defendant in payment of taxes on the land. *Mayes v. Blanton*, 67 T. 245.

*Blanton v. Mayes*, 58 T. 426; *Johnson v. Bonden*, 43 T. 670, and *Anderson v. Stockdale*, 62 T. 54, reviewed, and the doctrine adhered to that if only one of two independent executors named in a will qualifies, and debts against the estate exist, he may make a valid sale of the assets of the estate to pay them; if no debts exist, the executor would have no authority to sell under a will which only authorizes a sale to pay debts. *Roberts v. Connelley*, 71 T. 11.

(3.) It is the duty of an independent executor, when necessary to pay debts which can only be paid by sale of personal property, to sell and liquidate them; failing in this, he cannot, even when surety on a claim against the testator on which judgment was rendered during his administration, and land of the estate sold under execution, of which he became the purchaser, assert title to it against the heirs, whether his failure to pay the debts and thus prevented the sale, resulted from a corrupt motive or willful neglect; and this, independent of the fact that he paid an inadequate price. As a trustee, it was his duty to exercise good faith and deal fairly towards the devisees, and to preserve to them their land as far as duty to creditors would permit. See the opinion for facts pleaded with reference to which the above doctrine is announced. *Fortune v. Killebrew*, 70 T. 437.

### CH. 13.—SUBSEQUENT EXECUTORS AND ADMINISTRATORS.

ART.

1959. See Civil Statutes.

1960. Powers of subsequent administrators. *Annotated.*

ART.

1961 to 1963. See Civil Statutes.

#### ART. 1960. Powers of.

(1.) In a suit by an administrator *de bonis non* against the personal representatives of his deceased predecessor in the administration, to recover assets collected or received, and not accounted for, it is not essential that the entire former inventory of the estate should be set out in that petition. Allegations showing the value of the estate which was received by the former administrator, as shown by the inventory, the amount paid over by him, the amount turned over to the administrator *de bonis non*, connected with a statement declaring the money or property not accounted for, will be sufficient in a proceeding instituted to compel an account. *Dwyer v. Kalteyer*, 68 T. 554.

(3.) Construing chapter thirteen, of title thirty-seven, of the Revised Statutes, *held*: That it was the purpose of the Legislature to make a subsequent administration but the continuance of the former one, and to enable the administrator *de bonis non* to recover of his predecessor, whether he was an administrator or an independent executor, not only such property and funds as remained in his hands, but also any loss resulting to the estate from his mal-administration. *Dwyer v. Kalteyer*, 68 T. 554.

An administrator *de bonis non* may maintain an action to recover the proceeds of a note which has been fraudulently disposed of by a former administrator. *Williams v. Verne*, 69 T. 414.

(4.) The question is whether there is a cause of action contained in the pleadings of the plaintiffs.

1. The plaintiffs showed a right to sue. It was alleged that the estate was vacant by the removal of the administrator; that there were no debts owing by the estate; and that they were heirs of the intestate. Upon such state of facts, the estate vested in the heirs.

2. The petition, so far as it sought to revise proceedings in the administration had in the probate court, was defective because it was not accompanied by a copy of the proceedings complained of. To that extent, the demurrer was properly sustained. (Early Laws, Art. 1912, §§121, 122; 50 T. 598; 44 T. 133, 539 and 573.)

3. The breach of the bond alleged, in the most part of the particulars in the allegations relied on as a breach, was one of which creditors, devisees and heirs alone could complain. [Johnson v. Hogan, 37 T. 80.] The bond is for the protection of creditors, devisees and heirs. An administrator *de bonis non* could not sue except for the assets remaining unadministered, as shown in the administration. The right of the heirs to sue would follow their right to the possession of the property of the estate. The trust in the administrator created by the proceedings in administration having been executed, the estate being vacant, the property constituting the estate again vested in the heirs without incumbrance; vested in them the right, carried the legal remedies; and the right to call in question all the acts of the trustee which had not been sanctioned by the action and approval of the probate court in the progress of his administration. The bond was for the purpose of enabling those entitled to the estate to have satisfaction for breach of duty, and the right to sue is expressly given to the heirs. (Early Laws, Art. 1912, §114.) Ward's Heirs v. Ward, 1 U. C. 125.

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## CH. 14.—WITHDRAWING ESTATES FROM ADMINISTRATION.

ARTS. 1964 to 1972. See Civil Statutes.

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## CH. 15.—REMOVAL OF EXECUTORS AND ADMINISTRATORS.

ARTS. 1973 to 1976. See Civil Statutes.

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## CH. 16.—RESIGNATION OF EXECUTORS AND ADMINISTRATORS.

ARTS. 1977 to 1983. See Civil Statutes.

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## CH. 17.—ALLOWANCE TO WIDOW AND MINOR CHILDREN.

ARTS. 1984 to 1992. See Civil Statutes.

## CH. 18.—SETTING APART THE HOMESTEAD AND OTHER EXEMPT PROPERTY TO THE WIDOW AND CHILDREN.

<b>ART.</b> <b>1993.</b> Court shall set apart exempt property, etc. <i>Annotated.</i>	<b>ART.</b> 1994 to 2009. See Civil Statutes.
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**ART. 1993. Court shall set apart exempt property.**

(5.) The surviving widow is liable to the minor heirs of her deceased husband for reasonable rents of improved property improperly set aside to her as homestead by order of the probate court, when such order is corrected by direct proceeding for that purpose. *Linch v. Broad*, 70 T. 92.

(7.) The homestead having been set apart to the family is no longer subject to administration, and a sale of it made under the order of the probate court for the support of the widow and minor children is a nullity, and confers no title. [40 T. 385; 21 T. 664.] *Cummins v. Denton*, 1 U. C. 181.

(13.) The provision in the present Constitution enlarging the value of the exempt homestead, cannot be retroactively applied so as to include not only property which was of value up to the maximum exception of the former Constitution, when it was first acquired and occupied as homestead, and up to the maximum allowed by the present Constitution by reason of its increased value, but also contiguous property of value sufficient to make up, where the homestead was fixed, the full value of the present homestead exemption. *Linch v. Broad*, 70 T. 92.

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## CH. 19.—PRESENTMENT, ETC., OF CLAIMS AGAINST AN ESTATE.

<b>ART.</b> <b>2010 to 2025.</b> See Civil Statutes. <b>2026.</b> Action of court upon claims. <i>Annotated.</i> <b>2027 to 2030.</b> See Civil Statutes.	<b>ART.</b> <b>2031.</b> Action of court on claim a judgment. <i>Annotated.</i> <b>2032 to 2036.</b> See Civil Statutes.
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**ART. 2026. Action of the court upon claims.**

(4.) Though neither an executor nor administrator can rightfully allow a claim against an estate which is barred by limitation, yet if a claim apparently barred be thus allowed, its approval by the county court cannot be treated as a nullity by the heir. If it has been improperly allowed and approved, the remedy of the heir is by a direct proceeding to set the same aside.

In such a proceeding, every presumption will be indulged in favor of the allowance of the claim thus made, and it must be shown that no fact existed that would have suspended the statute of limitations during the period of its apparent operation. If the allowance be made by an independent executor, the approval of the county court is a nullity. *Howard v. Johnson*, 69 T. 655.

**ART. 2031. Action of court on claim a judgment.**

(2.) Any heir to an estate being administered, may appeal from the action of the probate judge allowing a claim against the estate, without notice of appeal, and this without regard to whether he had appeared and objected to the approval of the claim. The extent of the heir's interest is immaterial, and if the judgment of the court is reversed, it enures to the benefit of all the heirs in interest. (See, *Post*, Arts. 2201, 2202.)

The law requiring a denial under oath of the correctness of an account properly sworn to, has no application in proceedings in the probate court. *Glenn v. Kimbrough*, 70 T. 147.

T. 37, CHS. 20-25.] ESTATES OF DECEDENTS. Arts. 2037, 2108.

## CH. 20.—CLASSIFICATION AND PAYMENT OF CLAIMS.

ART.  
2037. Classification of claims. *Anno-*  
*tated.*

ART.  
2038 to 2050. See Civil Statutes.

ART. 2037. Classification of claims.

(1.) Where suit was pending at the date of the defendant's death, and was continued by his administrator, the proceedings are such an exhibition of the claim as will warrant the grading of it in the judgment rendered thereon. *Simpson v. Knox*, 1 U. C. 569.

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## CH. 21.—HIRING AND RENTING.

ARTS. 2051 to 2057. See Civil Statutes.

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## CH. 22.—SALES.

ARTS. 2058 to 2066. See Civil Statutes.

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## CH. 23.—REPORT OF SALES, ETC.

ARTS. 2067 to 2068. See Civil Statutes.

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## CH. 24.—ENFORCING SPECIFIC PERFORMANCE OF CONTRACTS.

ARTS. 2069 to 2096. See Civil Statutes.

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## CH. 25.—PARTITION AND DISTRIBUTION.

ART.  
2099 to 2107. See Civil Statutes.  
2108. Where estate consists of money  
or debts only. *Annotated.*

ART.  
2109 to 2134. See Civil Statutes.

ART. 2108. Where estate consists of money or debts only.

(1.) Under the statute a speedy partition of an estate that has been administered is contemplated after the payment of debts, and, since the law does not require the administrator to loan money remaining in his hands, interest cannot be exacted of him unless actually received.

When the record fails to disclose any injury resulting from alleged errors, the judgment will be affirmed. *Stonebraker v. Friar*, 70 T. 202.

## CH. 26.—FINAL SETTLEMENT.

<b>ART.</b> 2135. Duty of executor, etc., to present account. <i>Annotated.</i>	<b>ART.</b> 2136 to 2145. See Civil Statutes.
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### **ART. 2135. Duty of executor to present account.**

(1.) After an administrator has filed his final exhibit and report of his administration, which is approved, and the estate is partitioned among those entitled, after being withdrawn from administration, no power exists in the probate court to require the administrator to file an additional inventory, and an order requiring this is void. If the administrator is indebted to the heirs after such final report and close of the administration, and for assets not formerly reported or not accounted for by him, their remedy is by direct proceeding against him. *Davis v. Harwood*, 70 T. 71.

## CH. 27.—PAYMENT OF ESTATES INTO THE TREASURY.

**ARTS.** 2146 to 2163. See Civil Statutes.

## CH. 28.—ADMINISTRATION OF COMMUNITY PROPERTY.

<b>ART.</b> 2164. Community property liable for community debts, etc. <i>Annotated.</i>	<b>ART.</b> 2165 to 2183. See Civil Statutes.
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### **ART. 2164. Community property liable for community debts.**

(2.) The child who sues for his share in the community property of a deceased parent is not asserting an equity, but a legal title. [*Johnson v. Harrison*, 48 T. 268.] *Dickerson v. Abernathy*, 1 U. C. 107.

A deed made by the surviving husband after the death of his wife, to land which the husband had by parol contract bargained in exchange for other land during the lifetime of the wife (each party having entered into possession under the parol contract, and made permanent and valuable improvements), passes title when executed in pursuance of such contract, either to the contracting party or to his heirs at his request. Against the title thus conveyed, the heirs of the deceased wife can enforce no claim of right. *Garnett v. Jobe*, 70 T. 696.

A conveyance of the community property belonging to himself and deceased wife by the surviving husband, except where he has given bond, or where it is made in discharge of a community obligation, or in the settlement of community debts, is simply a conveyance of his own interest in the property, and in no way affects the heirs of his deceased wife. [*Kirkland v. Little*, 41 T. 460.]

After the death of the wife a surviving husband exchanged lots in a city belonging to the community estate of himself and his deceased wife, for a tract of land. The sale passed only his title to the lots, in no way dispossessed his children, and being in no way the trustee of their interest in the community property, they cannot elect to have their interest in the lots set apart to them out of the land so acquired in exchange therefor. [*Perry on Trusts*, 127.] It would be otherwise were he to buy land after the death of his wife with money belonging to the community estate, in which case the surviving husband would be a tenant in common with the heirs of the deceased wife in the property so acquired. [*McAlister v. Farley*, 39 T. 552.] *Dickerson v. Abernathy*, 1 U. C. 107.

After the death of the wife, a child of the marriage surviving, the husband sold the homestead, part for cash, remainder on credit, the vendor's lien being reserved. Suit was brought on the note for the unpaid purchase money and to foreclose the lien. Defendant resisted payment, pleading that the vendor, husband, owned but one-half interest, and that he had no right to sell the homestead so as to pass the right of the child. It appeared that the community was indebted at the wife's death, and that the sale was made to pay the debts. No replication was pleaded to the answer. *Held*, that plaintiff could show the indebtedness of



**T. 87, CHS. 29-31.] ESTATES OF DECEDENTS. Arts. 2190, 2207.**

the community as a basis for his power to sell the land to rebut the plea denying his authority without pleading such facts in replication.

It is well settled, and not an open question, that the surviving husband can sell community property to pay community debts.

The right of the surviving husband to sell the homestead to pay community debts has been recognized in 65 T. 635, *Ashe v. Yungst*, and the case is followed. *Fagan v. McWhirter*, 71 T. 567.

(5.) The death of the wife vests in her heirs, at once, her interest in community property, but does not dissolve a partnership of which her husband is a member, in a business in which the community property is invested; and if the firm continue to hold and use the community property, they are liable to the wife's heirs for the hire and rents of the property to the extent of the interest of such heirs therein; but the firm being called to account to the heirs for the use of the property, they are entitled to all legal and equitable offsets and credits.

Where a father, who is a member of a firm, has no estate or income outside of partnership property, the firm cannot be charged with the maintenance or education of his children, and the firm, as trustees of the children's property, would be justified in making an allowance sufficient for their proper support and education, and to be credited with such allowance on a settlement of the trust estate. The father, if he so elects, may hold and claim his homestead interest in the firm property, and the firm would not be chargeable with rents to that extent in a settlement with the heirs of the mother, but in such event the father would be bound to support his children, and the firm could not claim a credit for money spent for such children's education and support. *Simpson v. Gregg*, 1 U. C. 380.

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**CH. 29.—TRANSFER OF ADMINISTRATION.**

**ARTS. 2184 to 2189. See Civil Statutes.**

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**CH. 30.—COSTS.**

**ART. 2190. Commissions allowed. Annotated.**

**ART. 2191 to 2199. See Civil Statutes.**

**ART. 2190. Commissions allowed.**

(4.) The statute allowing commissions to executors and administrators is not applicable in the conduct of a mercantile business when conducted by them, and cannot be construed to extend to money expended in the purchase of goods, as well as money received for their sale. *Dwyer v. Kalteyer*, 68 T. 554.

An administrator may be allowed compensation for extra personal services rendered the estate, when shown to have been performed and necessary. Such a claim may be properly presented to the probate court in an exhibit made by the administrator under oath. *Stonebraker v. Friar*, 70 T. 202.

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**CH. 31.—APPEALS TO THE DISTRICT COURT.**

**ART. 2200 to 2206. See Civil Statutes.**  
**2207. Appeals shall be tried *de novo*. Annotated.**

**ART. 2208. See Civil Statutes.**

**ART. 2207. Appeals shall be tried *de novo*.**

(2.) Trials in the district court on appeals from a county court are had *de novo*, and in an appeal from a judgment admitting a will to probate, all evidence will be heard in the district court which could have been admissible in the county court. *Kelly v. Settegast*, 68 T. 18.

## TITLE 38.—EVIDENCE.

## CH. 1.—PERSONAL ATTENDANCE OF WITNESSES.

ARTS. 2200 to 2217. See Civil Statutes.

## CH. 2.—DEPOSITIONS OF WITNESSES.

ART.

2218. See Civil Statutes.

2218a. Deposition of witness residing in the county may be taken. *Annotated.*

2219 to 2228. See Civil Statutes.

ART.

2229. Execution of the commission. *Annotated.*

2230 to 2234. See Civil Statutes.

2235. Objections to depositions. *Annotated.*

2236, 2237. See Civil Statutes.

ART. 2218a. Deposition of witness residing in the county may be taken.

(2.) When a witness is in attendance upon court, and is held under the rule during the trial of the cause, his deposition, formerly taken, cannot be read. *MoClure v. Sheek's Heirs*, 68 T. 426.

ART. 2229. Execution of the commission.

(3.) The only method by which it can be known that what appears to be the answers of a witness taken through written interrogatories and a commission within the meaning of the law, are such answers, is by the certificate of the officer to the fact that the answers of the witness were signed and sworn to by the witness before him. The certificate of the officer must show that what purports to be the answers of the witness, became such by his signing and swearing to them before such officer. Unless this is shown, the depositions are not admissible in evidence. *Railway v. Brousard*, 69 T. 617.The deposition of a witness written out by the officer taking them, and properly returned after being sworn to and subscribed by the witness, may be read in evidence, though the answers be literally the same used by the same witness in a former deposition, and which were in the handwriting of the party to the suit at whose instance they were taken. Notice of such objection must be given before trial. *Lundy et al. v. Pierson and Wife*, 67 T. 233.

ART. 2235. Objections to depositions, when and how made.

(7.) When the answer of a witness in a deposition is evasive in response to a question pertinent to the issue, and having for its object the ascertainment of the witness' means of knowledge, the deposition should be excluded. *Railway v. Crowder*, 70 T. 222.(9.) An interrogatory propounded to a witness whose deposition was sought, after stating the case, requested him to "state any fact within his knowledge that will assist the court in arriving at a correct and just conclusion of the case, as fully as though specially here inquired about." *Held*, that the question was not proper by reason of its generality, which practically deprived the opposing party of the benefit of a cross-examination. *Railway Company v. Whitaker*, 68 T. 630.The answer to a general written interrogatory to a witness to "state any other fact within his knowledge of interest to either party as fully and minutely as if specially interrogated thereto," is inadmissible if objected to in time, but if there be no written notice of objection before trial, the objection will be regarded as waived. *Wade v. Love*, 69 T. 522.

The ninth cross-interrogatory to witness was as follows: "Could Ivy, by any act or effort on his part, have done anything that would have prevented the collision of the trains?" The answer of witness was: "He could not have prevented the collision, but he had plenty of time to get out of the way of it. When I left the caboose I got some torpedoes and told him I was going back to stop the second section of the train." To the reading of all of said answer but the words, "He could not have prevented the collision," plaintiffs objected, because the same

was not in response to the interrogatory. *Held*, error to sustain the objection—the objection not having been in writing and notice to defendant before the trial. *Railway v. Ivy*, 71 T. 409.

When a party to a suit, in testifying by deposition taken at his own instance, declines to produce, in response to a cross-interrogatory, letters or documents in his possession which are called for by his adversary, on the ground that they are too voluminous, and not that they are irrelevant to the issue, the deposition should on motion be suppressed. *Coleman & Davidson v. Colgate*, 69 T. 88.

(10.) A motion to suppress depositions because the questions to the witness are leading, should be overruled when the motion fails to designate the specific questions deemed objectionable. This held in a case where some of the questions were leading and others were not. *Neyland v. Bendy*, 69 T. 711.

The law requires that the *motion* to suppress must be made and *notice* of it given to the adverse party before the trial commences; the notice was waived and consent given that the court could consider the motion; when this is done or when the notice is given before the trial commences, the court will act on it either before the trial commences or after. The law does not prescribe that the motion shall be acted on before the trial begins, but that notice of it be given before. *Coleman & Davidson v. Colgate*, 69 T. 88.

### CH. 3.—DEPOSITIONS OF PARTIES.

#### ART.

2238. Party may take his own deposition. *Annotated.*

2239. May take deposition of adverse party. *Annotated.*

#### ART.

2240 to 2242. See Civil Statutes.

2243. Refusal to answer, etc. *Annotated.*

2244. See Civil Statutes.

#### ART. 2238. Depositions of a party may be taken by himself.

(1.) A defendant caused interrogatories to be propounded to himself, which the plaintiff crossed. Instead of answering them he appeared before the officer receiving the commission and declined to answer, on the ground that he intended to attend the trial and testify on the stand. Having appeared at the trial and testified, failure to answer the cross-interrogatories of the plaintiff did not warrant their being taken as confessed. *Dunham, Buckley & Co. v. Simon*, 1 U. C. 548.

#### ART. 2239. Deposition of adverse party may be taken.

(5.) Our statute makes no provision for the taking of depositions to be used upon a motion for a new trial. Its entire provisions apply solely to depositions to be used on the trial of a cause. With no authority to take the depositions upon an application for a new trial, much less as here, at a time when no application was pending which the depositions could possibly sustain, the appellant could not claim that a failure to reply to his questions was confession of a fact they were intended to establish. In order to entitle a party to the answer of his opponent to interrogatories, and consequently to a confession in case of a failure to answer, he must bring himself within the provisions of the statute giving him the right to take the answers. Otherwise, it is the right of the interrogated party to refuse to answer without suffering injury. Besides, no satisfactory reason is given why the plaintiff was not asked as to this matter at or before the trial of the cause. He was not shown to have been beyond the reach of a commission before the trial, nor absent whilst it was going on. Hence no diligence to get the evidence was shown. Nor was it newly discovered. *Cleveland v. Sims*, 69 T. 153.

#### ART. 2243. Answer taken as confessed, when.

(4.) Construing this article, *held*, that an interrogatory propounded to a party to a suit, which he refuses to answer, can only be taken as confessed when it is relevant and pertinent to some right existing in the party who interrogates, at the time when the answer is required by the officer executing the commission. *Barnard v. Blum*, 69 T. 608.

## CH. 4.—GENERAL PROVISIONS.

ART.

2245.

Common law rules of evidence.

*Annotated.***Rule 1.** Witness must be sworn and examined, how (4).**Rule 2.** Evidence is the means by which the issue is determined (9), (11), (13), (14).**Rule 3.** Admissibility of evidence a question for the judge (15).**Rule 4.** The effect of evidence a question for the jury (16).**Rule 5.** Evidence must relate to facts in issue, and to relevant facts (19), (20).**Rule 6.** Facts are relevant when so connected with a fact as to form part of the same transaction or subject matter (21).**Rule 7.** A variance between the allegations and pleadings which misleads, is fatal (22), (29).**Rule 8.** The substance of the issue only need be proven. See Civil Statutes (30).**Rule 9.** The best evidence is to be produced (31), (32), (33), (35).**Rule 10.** Secondary evidence admissible. See Civil Statutes (45).**Rule 11.** Secondary evidence admissible to prove contents of a lost instrument, etc. (46).**Rule 12.** The burden of proof lies on the party asserting a fact (48); as to agency (49); boundaries (50); carriers, damages against (51); damages liquidated (52); damages against a telegraph company (55); damages for breach of contract (56); damages when remote (58); damages, exemplary (59), (60); fraud (66); sale (67); malicious prosecution (70); negligence (73); payment (81); sale (82); warehouseman (86).**Rule 13.** Public officers are what they are reputed to be (88).**Rule 14.** The regularity of official acts is presumed (89).**Rule 15.** Courts will, without proof, take notice of facts of a public nature (90), (92), (94a).**Rule 16.** Ancient wills and deeds admitted without proof (95).**Rule 17.** The existence of a deed may be presumed from possession, etc. (96).

ART.

2245.

**Rule 18.** A grant may be presumed in support of a legal claim, etc. (97).**Rule 19.** A fact may be inferred from the proved existence of a relevant fact (101), (103), (111), (116).**Rule 20.** A written agreement cannot be varied by parol evidence, etc. (117).**Rule 21.** Contemporaneous agreements construed together (118).**Rule 22.** Parol evidence admissible to explain meaning of words in a written agreement (120).**Rule 23.** Blanks in a written instrument may be filled, etc. See Civil Statutes.**Rule 24.** Parol evidence admissible to contradict recital of payment, etc. See Civil Statutes.**Rule 25.** Parol evidence admissible to show want or failure of consideration (123).**Rule 26.** Parol evidence admissible to show that a deed was intended as a mortgage (124).**Rule 27.** Parol evidence admissible to show that a deed was made for the benefit of another not named in it. See Civil Statutes.**Rule 28.** A written instrument may be reformed (127).**Rule 29.** Parol evidence admissible to show a condition precedent (129).**Rule 30.** Parol evidence admissible to show a written agreement to have been rescinded, etc. See Civil Statutes.**Rule 31.** A judgment is conclusive (131), (133), (135), (147), (148), (156).**Rule 32.** A recital in a deed binds parties, etc. (166).**Rule 33.** Admissions of a party or agent admissible in evidence (167).**Rule 34.** *Res gestæ* admissible in evidence (168), (170).**Rule 35.** Hearsay competent evidence to prove pedigree, etc. (171).**Rule 36.** On questions of science, etc., opinions admissible in evidence (172), (173).

## ART.

2245. *Rule 37.* A party is estopped from denying a fact by which another has been induced to act, etc. (174), (182), (185), (188), (191a), (192), (193), (198).

2246. See Civil Statutes.

2247. Husband and wife not disqualified, when. *Annotated.*

2248. Evidence of a party in suits against executor, etc., incompetent, when. *Annotated.*

2249. See Civil Statutes.

## ART.

2250. Printed statute books, evidence. *Annotated.*

2251. See Civil Statutes.

2252. Copies of public records, evidence. *Annotated.*

2253. Copies of records and certificates of facts admissible in evidence. *Annotated.*

2254 to 2256. See Civil Statutes.

2257. Recorded instruments evidence, when. *Annotated.*

2258 to 2265. See Civil Statutes.

2266. A verified account evidence, when. *Annotated.*

## ART. 2245. Common law rules of evidence.

RULE 1.—*Witness must be sworn and examined, how.*

(4.) The answers of a witness having been read by one party to discredit another witness, the adversary may introduce in evidence the further answers of the witness tending to show his own temper and feeling toward the witness he thus seeks to discredit, and his motives and interest in a former prosecution of the witness, about which he has been interrogated. The inquiry cannot extend beyond the witness' own statement of his connection with such prosecution. *Railway v. Coon*, 69 T. 730.

When a witness has on cross-examination more than once answered a question propounded by counsel, whether he shall again be required to make answer to the same question is a matter within the discretion of the trial judge. The great object of the examination being to elicit the truth, the bearing, moral courage, bias, memory and demeanor of the witness being apparent to the trial judge, will furnish guides for his discretion in determining the extent of the cross-examination, and that discretion will not be revised when no injury could have resulted from its exercise. It is also within the discretion of the judge to permit a plaintiff who has been examined as a witness to be recalled to correct his testimony previously given. *Railway v. Pool*, 70 T. 713.

A witness cannot be impeached or contradicted upon matter not relevant to the issue. *Railway v. Coon*, 69 T. 730.

RULE 2.—*Evidence is the means by which the issue is determined.*

(9.) When an article to which testimony relates can be brought into court and exhibited to the jury, it is proper that it should be done. *Hays v. Railway*, 70 T. 602.

(11.) The fact that evidence may be weak and have but slight bearing on the issue to be tried, affords no reason for its exclusion. *Armendais v. Stillman et al.*, 67 T. 458.

(13.) Though evidence which should have been excluded was admitted on the trial of a cause, it can afford no ground for a reversal of a judgment, which, in view of all the facts properly in evidence, it could not have influenced. *Tucker v. Smith*, 68 T. 473.

Where a fact is not disputed, or is well established by competent testimony, the admission of incompetent testimony which is immaterial and which could not have had any influence upon the jury, is no cause for reversal. *Railway v. Moody*, 71 T. 614.

(14.) If, on the trial of a cause before the judge without the intervention of a jury, illegal evidence is admitted over objections thereto which, if considered, may have improperly influenced the judge, in the absence of something in the record showing that such evidence was not considered, its admission is error, for which the judgment may be reversed. *Wagoner v. Ruple*, 69 T. 700.

RULE 3.—*Admissibility of evidence a question for the judge.*

(15.) The ruling of the court on an objection to the introduction of testimony, where the ground of objection is not stated, will not be revised by the appellate court, unless it relates to the relevancy or competency of the evidence offered. [21 T. 783.] *McDannell v. Horrell*, 1 U. C. 521.

**RULE 4.—The effect of evidence is a question for the jury.**

(16.) The rule in civil cases, even in the case of proving the existence of fraud, does not require that the proof be made to a moral certainty or beyond a reasonable doubt. *Wylie v. Posey*, 71 T. 34.

In a suit to reform a deed, the evidence of mistake or fraud must be clear and satisfactory to the existence of the alleged mistake, etc. *Monks v. McGeady*, 71 T. 135.

Where a charge indicates the necessity of "full proof," and it appears that by that term was meant that the jury must be satisfied in their minds of the existence of the fact, such charge was erroneous in requiring more than a preponderance in the testimony as the grounds of the verdict. *Baines v. Ullmann*, 71 T. 529.

(17.) While the contract provided a mode for ascertaining the number of cattle for which pasture fees should be paid, although resort to that mode was prevented by the voluntary act of the owner of the cattle, still the determination of the number was for the jury upon all the testimony. It was error in the court to charge that the largest number proven to have been put in should be found. *McAuley v. Harris*, 71 T. 632.

**RULE 5.—Evidence must relate to facts in issue and to relevant facts.**

(18.) Objections to evidence must pertain to its competency, not its sufficiency, and evidence which is competent cannot be excluded during the progress of a cause merely because other evidence, that in connection would seem to render it sufficient, had not already been introduced. Evidence when offered to show a conveyance of land is competent, though it may not describe the land, if it refers to other writings for specific description. *Catlett et al. v. Starr*, 70 T. 485.

One who employs another at an agreed price to perform mechanical work in the construction of a specific article, who accepts, receives possession of and uses the article after its completion, is liable to the workman for the reasonable value of his work. *Harris County v. Campbell*, 68 T. 22.

When the relevance of evidence to sustain an issue depends on the existence of other facts not in evidence, and no statement is made that counsel expect to establish such facts, it is not error to exclude the evidence. *Harvey v. Edens*, 69 T. 420.

Suit for libel upon two newspaper publications, the first, August 9th, 1886, charging the plaintiff with selling diseased and unwholesome meat; the other, September 6th, 1886, containing what purported to be the evidence taken in a complaint against the plaintiff for selling diseased meat, on which examination the plaintiff had been discharged. The defendant pleaded the truth of the charge on the trial. On the trial the defendant offered to prove that the publication of September 6th was a truthful report of the testimony taken upon the examination. On objection the testimony was excluded. *Held*:

1. While under the pleadings the defendant could prove the truth of the charge, this could not be proved by this evidence.

2. The action was not upon the report as untrue, so that its truth was not in issue.

3. The testimony was properly excluded.

It is inadmissible to plaintiff in a libel suit to show that the defendant is wealthy. Such testimony improper, either to show actual damages or as guide in fixing exemplary damages. *Young v. Kuhn*, 71 T. 645.

(20.) In a suit against a defaulting treasurer, when it is material to ascertain who among his sureties on different bonds, covering different periods of time, are liable, every fact showing the dealings of the treasurer with the trust fund is admissible in evidence. *Screwmen v. Smith*, 70 T. 168.

An allegation that the plaintiff has received personal "injuries in his spine, chest, head and limbs," will authorize evidence that heart disease had been a result of the injury inflicted. *Railway v. McMannewitz*, 70 T. 73.

Evidence though not primarily admissible, because not directly relevant to the matters in issue, may be rendered proper in rebuttal. See opinion for an illustration. *Wade v. Love*, 69 T. 522.

The admission of improper evidence in favor of one party to a suit will not authorize the adversary to introduce improper evidence in rebuttal, if objection

be made thereto. *Dolson v. DeGanahl*, 70 T. 620; *McCartney v. Martin*, 1 U. C. 143.

It was not material error to admit testimony that the defendant company had an ample supply of cars empty and idle at a station near the point of shipment. The defendant having pleaded and introduced testimony tending to show a crowded condition of business at the time, on the road. *Railway v. McCorquodale*, 71 T. 41.

It was irrelevant upon the question of damages to show that the plaintiff had contracted for the sale of the cattle at their destination, and that they were refused, because not such as had been represented, and not for or on account of their condition. Such testimony did not tend to show the amount or limit of damages suffered. *Railway v. McCorquodale*, 71 T. 41.

**RULE 6.**—*Facts are relevant when so connected with a fact as to form part of the same transaction or subject matter.*

(21.) The courts hold, almost without dissent, that a person guilty of negligence contributory to his injury may recover, notwithstanding his own negligence, if the defendant, after discovering plaintiff's danger, fails to use ordinary care to avoid injuring him. But in general, where the defendant owes the plaintiff no duty, and is not aware of his danger, though the discovery might have been made by the exercise of ordinary prudence on the part of defendant, no recovery can be had. In the *Symkins* case, 54 T. 615, it was held that if, after *Symkins* went on the track of defendant, he was stricken down in a fit, and was thus run over by the train, that his negligence in going on the track was only a remote cause of his injury, and that a providential occurrence intervening broke the causal connection between the original act of negligence and the injury, and that, therefore, the defendant would be liable for the injury, if its servants failed to use ordinary diligence to discover the plaintiff while lying on the track in a helpless condition. In the case of *O'Donnell v. The Railroad*, and other cases of infant trespassers, negligence was not imputed on account of the want of discretion in such persons, and the roads were held liable on account of failing to use ordinary diligence to discover the person on its track and prevent his injury; but no court in Texas has ever held a railroad company liable for failing to discover a sane man who was on its track without right and under circumstances that rendered the act of being on it negligence contributing proximately to the injury. *Railway v. Ryon*, 70 T. 56.

If one who is injured by a passing railway train, while upon a railway track, went upon it under such circumstances as rendered him guilty of negligence, the railway company will not be liable in damages on account of the failure of its servants who are operating the train to discover his position in time to avoid the injury, nothing having intervened between the time of his going on the track until the time when he was injured to relieve his act in going on the track from its culpability. *Railway v. Ryon*, 70 T. 56.

In an action against a railway company to recover damages for injuries that resulted in the death of plaintiff's minor son, the only connection in which the minority of the deceased can be considered is on an inquiry as to whether the railway company which employed him had used such care as his age and inexperience would render necessary. When the action is for the loss of services of the child, the rule is different. *Railway v. Crowder*, 70 T. 222.

The owner of real property is entitled to its exclusive use and enjoyment, and is not liable for injuries occasioned by its unsafe condition when the person receiving the injury was not at or near the place of danger by lawful right, and when the owner has neither expressly nor impliedly invited him there, or allured him by attractions or inducements exhibited or held out in some way, and calculated to lead him into danger, without giving notice of the point to be avoided.

A trespasser or mere licensee who is injured by a dangerous machine or contrivance on the land of another cannot recover damages, unless the machine or contrivance is such that the owner may not lawfully erect, or when the injury is inflicted willfully, wantonly or through the gross negligence of the owner or occupant of the premises.

One who goes into a place of his own volition where machinery belonging to another is being operated, and on his own business, not being employed or invited by the owner or those in charge, and is injured by such machinery while

passing through a place in which employes usually go, and in which only mechanical operations are usually performed, usual in such places, cannot recover damages for injuries inflicted in such a place by mechanical appliances which from their location and use are not dangerous to those acquainted with the locality. *Oil Co. v. Morton*, 70 T. 400.

When injury is received by one in the employ of another while engaged in the performance of service for his employer, but which is rendered in a manner violative of the rules of the employer, no damage can be recovered from such employer. It will be presumed, in the absence of evidence to the contrary, that in such case the employé knew of the general rules made to govern him in the employment.

No damage can be recovered from an employer for injuries sustained through the negligence or incompetence of co-employé, unless it is shown that the employer has failed to exercise proper care in his selection. *Pilkinton v. Railway*, 70 T. 226.

It is the duty of one who receives personal injuries from the wrongful act of another to use ordinary care and prudence to have himself cured, and he forfeits his rights to recover damages that might have been saved, and which resulted from his own negligence in failing to adopt means of cure. *Railway v. Coon*, 69 T. 730.

If the owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce confident belief that the use will not be objected to, and, therefore, to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as not to mislead others to their injury without a proper warning of his intention to recall the permission. In such a case when the user by the public of a path crossing a railway track might not consider it such a crossing as to impose on the company the statutory duty to signal the approach of its train, yet the failure to do so might, according to the facts of the case, constitute negligence.

The degree of care requisite to avoid liability for negligence must be proportioned to the nature of the act performed, the place where performed, and the extent of the danger and injury likely to result from a failure to use due care and prudence to avoid inflicting injury on others.

It cannot be held that a child should be held chargeable with the same prudence in crossing a railway track that would be required of an adult in order to avoid having contributory negligence imputed to him. Whether such care and prudence is used by a child in crossing a railway track as would be incumbent on one of his age must be a question to be determined by a jury. *Railway v. Boozer*, 70 T. 530.

When the issue is whether one who was the apparent purchaser of property, but who was alleged to have been insolvent, really purchased it, or permitted his name to be used as a purchaser to aid the fraudulent designs of the real purchaser, any testimony directly tending to show that such apparent purchaser did not have enough money or property of his own to effect the purchase, is admissible. In this connection it can be shown what were his business employment and habits, as to being frugal or prodigal, but evidence that he frequented saloons and houses of ill fame is too remote, and should be excluded, as tending to improperly prejudice the jury. *Stone v. Day*, 69 T. 13.

The fact that a loan of money under circumstances stated was unusual and violative of custom among bankers, cannot be given in evidence against the bankers making the loan, in a suit by an attaching creditor against them and the borrower to establish fraud and collusion, and to postpone the levy made by the bankers to secure the loan to a subsequent attaching creditor. *Blum v. Bassett*, 67 T. 194.

That other horse teams became frightened at the crossing is competent as a circumstance to show the condition as to safety, etc., at and before the injury, it being shown that the team of the deceased was running as if from fright immediately upon passing the crossing. *Railway v. Hill*, 71 T. 451.

All said at the time upon the same subject is admissible when a part of a conversation is introduced in evidence by one party, that is, such other parts of the same conversation as will explain the part admitted should be heard, so that the whole admission may be understood; parts not explanatory of that admitted nor pertinent to the case should be excluded. *McAuley v. Harris*, 71 T. 632.



**RULE 7.—A variance between the allegation in pleading and the evidence which misleads the adverse party is fatal.**

(22.) Courts do not look with favor on objections to testimony during the trial of a case, taken upon the ground that the pleadings are insufficient, where no exceptions have been filed by the party objecting; and it is only when pleadings are wholly defective, showing no cause of action, or no defense, that objections to testimony, because of insufficiency of the pleadings, ought to be entertained. [27 T. 271.] *McDannell v. Horrell*, 1 U. C. 521.

In action for personal injury the evidence showed the act to have been at a different place from where alleged. *Held*, that

1. The action is transitory; the allegation was immaterial, and it was not necessary that it be proved.

2. The counsel of defendant, upon the testimony developing the different locality, if he had been misled by the allegation, should have made known his surprise, and would have been entitled to withdraw his announcement and to a continuance. *Brown v. Sullivan*, 71 T. 470.

(25.) In trespass to try title, when the deed under which plaintiff claims is shown to cover more land than is embraced in the description given in the petition, that fact constitutes no variance. *Broxson v. McDougal*, 70 T. 64.

(26.) In a suit on a promissory note payable to the plaintiff as guardian, in which the ward's name is correctly set forth, a variance between the judgment entry, which erroneously gives the initial letter of the ward's middle name, and the petition is immaterial. The allegation of the fiduciary character in which the guardian sues when the note is made payable to him as guardian is but a *descriptio personæ*, which might be omitted altogether without affecting the judgment. *Crawford v. Wilcox*, 68 T. 109.

(29.) A certified copy of the transfer of a land certificate made before the issue of patent to the purchaser, as assignee, which identifies the certificate by the name of the grantee, the date of its issuance, and its number, is admissible in evidence for one claiming under a patent to the assignee, which on its face purports to have been issued by virtue of a certificate of the same number, and issued to the same grantee.

Though a patent to land may not disclose the number of the certificate by virtue of which it issued, that fact may be shown by certificate of the commissioner of the general land office. *Talbert v. Dull*, 70 T. 675.

**RULE 9. The best evidence is to be produced.**

(31.) Secondary evidence of the contents of a written contract cannot be admitted in the absence of proper diligence to secure the original. *Law v. Tandy*, 70 T. 745.

When rights involved in a sale are fixed by written contract between the parties which is not produced on the trial, and the sale is proved by parol without objection, the failure to produce the written contract of sale becomes immaterial. *Brown et al. v. Lessing et al.*, 70 T. 544.

When a fact which from its nature and the circumstances surrounding it is susceptible of direct proof, the absence of which proof is not explained, evidence secondary in its character and tending remotely by inference to establish it should be excluded. *Watson v. Walker & Co.*, 67 T. 651.

(32.) Testimony to establish the contents of a telegram is not admissible in the absence of evidence showing its loss or destruction. *Prather v. Wilkins*, 68 T. 187.

It was shown that a copy of the black list (sought to be proved) had been in possession of an assistant superintendent of the defendant railway company; that said assistant had returned the paper to the general superintendent, and notice to produce had been served upon defendant. *Held*, that the predicate was sufficient to admit secondary evidence to the contents of such paper or list. *Behoe v. Railway*, 71 T. 424.

(33.) Parol evidence that a witness had been called to witness a sale of land is admissible, not for the purpose of establishing a sale, but as a circumstance explanatory of the purpose with which a deed was afterwards delivered to the alleged purchaser, the fact that it was delivered in consummation of a purchase being controverted. *Mitchell v. Allen*, 69 T. 70.

Where there is no contention as to the contents of a written lease it is competent to prove by parol its existence and its transfer without accounting for its non-production.

Nor would the admission of a certified copy of such lease, without accounting for the original, be material error, the terms of the instrument not being in issue. *Howard v. Britton & Co.*, 71 T. 286.

(35.) The custodian of a public record is the proper officer by whom to establish that a record does not exist. *Edwards v. Barwise*, 69 T. 84.

**RULE 11.**—*When a written instrument is lost, destroyed or mutilated, or is out of reach of a subpoena duces tecum, secondary evidence admissible.*

(46.) Secondary evidence is admissible to show the contents of a deed of assignment conveying property situated in other states, as well as property in Texas, and which deed is beyond the jurisdiction of the court. When such secondary evidence is in the shape of separate depositions of the several witnesses who prove the execution of the original deed, the fact that a correct copy of the instrument is attached to each deposition, and that no two of the witnesses swear to the same copy, is immaterial, since a comparison of the copies will verify whether they are from the same original. *Harvey v. Edens*, 69 T. 420.

In the predicate made for the admission of secondary evidence, the quantity of preliminary proof is for the judge trying the cause to pass upon, and its sufficiency is largely within his discretion. Unless it be clearly shown that the court erred in so admitting secondary evidence, where there is *prima facie* proof as to search and inquiry of the proper persons and at the proper places shown in the preliminary testimony, the act of the judge will not be reversed. See this case for proof held sufficient. [*White v. Barry*, 27 T. 50; *Wharton on Ev.*, 141; *Bailey v. McMickle*, 9 Cal. 430; *Diehl v. Ewing*, 65 Pa. St. 326.] *Jackson v. Deslonde*, 1 U. C. 674.

The contents of a lost instrument of writing which was once recorded by a county clerk without authority of law, and who took the maker's acknowledgment thereto, cannot be established by proof that the clerk and subscribing witnesses are dead, and by proof that the record was in the handwriting of the clerk. If the clerk were alive he might swear to the record as an examined copy. *Shifflet v. Morelle*, 68 T. 382.

**RULE 12.**—*The burden of proof lies on the party asserting a fact essential to his right of action or defense, and put in issue by the pleadings of the adverse party.*

(48.) The burden of proof is upon the plaintiff where want of consideration is set up as defense to suit on a note, but the production of the note is *prima facie* evidence of consideration, which, if not rebutted, is sufficient to maintain the plaintiff's case. It is proper for the defendant to rebut this evidence and avoid the *prima facie* case so made, and the burden of proof all along is on the plaintiff to satisfy the jury, upon the whole evidence in the case, of the fact of the consideration for the note. [6 Cush. 367; *Powers v. Russel*, 13 Pick. 76.] *Solomon v. Huey*, 1 U. C. 265.

When no issue is made involving the contributory negligence of the plaintiff who sues a railway company for damages caused by fire emitted from its passing engine, the burden of proof is on the company to show that there was in fact no negligence on its part in causing the damage. If such an issue is made the burden of proof is first upon the plaintiff to show that he was not guilty of negligence.

If the owner of cotton or other inflammable material designed for shipment on a railroad, deposit it for shipment on a railway platform so near to where the locomotive engines pass as to cause danger of its being ignited by sparks emitted from the locomotive, the railway company, in a suit for damages caused by its destruction from fire, would not be required to show that it had used all reasonable and necessary precaution to guard against fire, in order to relieve itself from liability. This rule applied in a case where the company agent had informed the plaintiff a few days before the trial that the company had no cars to transport freight, and when it was shown that the company agent would not receive cotton for shipment unless it was on the platform. *Railway v. Bartlett*, 69 T. 79.

An old woman, aged seventy, in the night time, was put off a train a few hundred yards from the station where she should have been left. The ground was

wet and it was raining. Subsequently she was ill. There was testimony that the bronchial affection from which she suffered may have resulted from rheumatism, to which she was subject, old age or a hereditary predisposition to consumption. The court charged the jury: "If the proof shows the sickness was not the result of her being put off, but that it is reasonably certain that it would have resulted from her age and health, and that such sickness is reasonably certain to result from age, rheumatism and predisposition to consumption, and that the treatment of plaintiff on that night did not superinduce the disease, then the railway company would not be liable for any permanent injury." *Held*:

1. The instruction changed the burden of proof from plaintiff to the defendant.

2. It devolved upon the plaintiff to show that the injury was caused by the defendant. *Railway v. Burns*, 71 T. 479.

(49.) To constitute an accord and satisfaction of a claim for unliquidated damages, it must appear that the claimant agreed to receive something in lieu of the sum to which he believed himself entitled, and that this has been paid. A promise to pay by the agent of the party against whom the damage is claimed, when made under such circumstances as not to impose an obligation on the injured party to receive payment, is not sufficient.

Though an accord may be based on an implied contract, yet the implied contract must be one which results as a necessary consequence from the facts which it is claimed create it.

[*Hinkle v. Railway*, 15 American and English Railway Cases, 391, and *Stockton v. Frey*, 4 Gill, 412, reviewed.]

An accord must be followed by complete execution before it can operate as a bar to the original cause of action. The acceptance of a promise can affect such a result only when it clearly appears that the intention of the claimant was to accept the promise in full satisfaction of his claim. *Railway v. Gordon*, 70 T. 80.

Agency may be established by showing that the principal had habitually ratified the acts of the alleged agent in similar transactions. *I. & G. N. Ry. Co. v. Ragsdale*, 67 T. 24.

The fact that one has on a former occasion paid drafts drawn on him by another, cannot of itself render him liable for purchases made by such other person as his agent, nor can it estop him from denying that an agency ever existed. *Farrar v. Talley & Hester*, 68 T. 349.

Agency cannot be established by evidence of the declaration of one who represents himself as the agent. *Coleman & Davidson v. Colgate*, 69 T. 88.

The extent of the authority of the agent is to be measured by the nature of the business, the subject-matter of the contract and the varying circumstances of the transactions involved. One who is agent for another in conducting and managing a business establishment which requires timely purchases of stock from time to time has authority to purchase goods for cash or on time, and, if bought on a credit, to contract in the name of his principal to pay for them at the place of delivery, or at any place which might be agreed on with the seller, which would not impose upon the principal conditions of such character that a reasonable mind would fairly infer that the principal would not authorize an agent in the usual course of business to bind him to perform. [Story on Agency, sec. 85.] *Miller v. McDannell & Co.*, 1 U. C. 258.

In a suit against a company to recover a reward offered by its officers, the declarations of a third party, who assumed to act for the company, are not admissible in evidence against it for the purpose of showing that the defendant agreed to pay the reward, in the absence of his authority to make them, when there is no proper plea setting up such authority, and this, though they were made by the superintendent of the company. *Blain & Kelly v. Express Co.*, 69 T. 74.

It is urged that a proclamation offering a reward for the arrest of the two persons, if acted upon in the arrest of one, would constitute a contract that might be apportioned, and the plaintiffs under it entitled to one-half of the reward offered for the arrest of both on the arrest of one of the persons for whom the reward was offered, and so, independent of any declaration or agreement to that effect claimed to have been made after the arrest. The promise is to pay so much money for the arrest of the two persons. This is an entire proposition which, when acted upon by any person, would constitute a contract single in its nature, and not subject to apportionment under rules recognized wherever the common

law is in force. No facts are stated, such as that the plaintiffs were prevented from arresting both the persons for whom a reward was offered by the fault or fraud of the defendant, from which the law would raise a new contract and give a remedy on a *quantum meruit*. It would be but the ordinary case of a partial performance of an entire contract if it affirmed that the act done by the plaintiff was performed with a knowledge that the reward had been offered, which does not appear to have been true in this case.

It does not become necessary to determine whether one who, without knowledge that a reward has been offered for a named person, arrests such person, is entitled to the reward; as to this there is some conflict of authority. Nor does it become necessary to determine whether the fact that the plaintiffs were peace officers would defeat their right to recover the reward if they were otherwise shown to be entitled to it. *Blain & Kelly v. Express Co.*, 69 T. 74.

(50.) In determining the bounds of a survey, a call for course and distance will not yield to a call for an unmarked prairie line, which cannot itself be ascertained except by running the boundaries of another survey according to course and distance.

The law presumes that a surveyor has surveyed around the land located and intended to be embraced in the calls of the patent, unless the contrary appears from evidence. *Gerald v. Freeman*, 68 T. 201.

Though in ascertaining the true location of a corner of a survey, a call for a natural object is of the highest dignity, to which other conflicting calls must yield, yet such a call is only invested with superior dignity because of its greater certainty; since the surveyor is more likely to have been mistaken in his calls for course, distance and quantity than in a call for a fixed natural object. It does not follow, however, that a call for a natural object must, if the object be found, fix it absolutely as one of the bounds of the survey, since the surveyor may have committed a mistake in calling even for the natural object; to show such mistake, evidence is admissible. See opinion for facts illustrating the rule. *Koepsel v. Allen*, 68 T. 446.

In determining the position of a corner which is called for as being located a given course and distance from a bearing tree, and which has no other proximate natural or artificial object to fix its exact location, that call is entitled to no greater dignity than a call for course and distance from another corner of the same survey which is fixed and identified by a natural object called for and found; for in each instance the corner sought can only be found by measurement from the known object. When in such a case it is found that such calls are conflicting, and cannot both be harmonized, then effect should be given to the one which is most in harmony with the other calls of the grant, and with the lines of contiguous surveys called for. *Davidson v. Kellen*, 68 T. 406.

A survey upon which the patent issued called for the north boundary line of a patented survey, made three weeks before by a surveyor who surveyed both, as its south boundary. This line could not be identified by natural or artificial objects either at its terminations or along its course. The locality of the northern boundary of the junior survey and of the south boundary of the older survey, which lay south of the former, were identified by established corners. Running each survey from its established corners, according to course and distance, a common boundary was not reached, but a space two hundred and eighty varas wide intervened. In a suit by the owner of the land covered by the junior survey against the owner of the older survey, who was in possession of the disputed strip, held:

1. The rule that a call for the marked line of an older survey will prevail over a call for course and distance has no application to an unmarked line whose terminal points cannot be identified by natural or artificial objects.

2. If the manifest mistake made in the calls was a mistake in distance, there is no rule of law which, in the absence of evidence, would raise a presumption against or in favor of either survey.

3. The burden of proof was on the plaintiff to show that the patent under which he claimed embraced the land claimed and occupied by defendant; failing in this, the defendant was entitled to judgment. *Duff v. Moore*, 68 T. 270.

The file indicates where the survey should be made. The survey is evidenced or certified by the field-notes, which are recorded and transmitted to the land office, to be included in the patent for the land.

The laws afforded a means to compel the surveys to be made in accordance with a legal file. If a survey does not conform to the file, and no means are taken to correct the survey by the certificate holder or others interested in the land included, such survey, when matured into a patent, fixes the right of the land, regardless of whether made in accordance with the file or location of the certificate.

After patent, the file or location is not important save as it may throw light upon an actual survey. [26 T. 68.]

In a rectangular survey, so appearing in its calls and on the maps, three corners are known: the fourth is not ascertained otherwise than by course and distance from the third corner. The call is two hundred varas longer than the parallel line on the south. *Held*, that it was not error in the court to refuse to instruct the jury that the survey should be closed by connecting the first and fourth corners. It was not error to close the survey by reversing the last call from the first corner and running the proper course to the intersection with the third line.

The survey which is elder in date which can be ascertained without the aid of a junior survey, the two made by same surveyor and within a few days of same date, will have priority in right. *Forbes v. Withers*, 71 T. 302.

When a marked line is called for in a grant, it is only when the line can be identified on the ground as the one made by the surveyor that it will control a call for course and distance.

The law does not require the distance named in the field-notes of a grant to be greatly extended to reach a line, merely because it is found on the ground with marks corresponding in age with the date of the grant. He who claims the right to so extend the distance, and give superior dignity to the marked line, must show that the line was the one marked on the ground by the surveyor preparatory to the issuance of the grant. *Fagan et al. v. Stoner et al.*, 67 T. 286.

In a contest regarding a dividing line between lands purchased from a common vendor, it appeared that the deed of the last purchaser called for the dividing line as described in the deed to the first purchaser, with reference to course and distance and corners. The line was actually run and marked at the time of the first purchase. *held*:

1. Though it was apparent that the surveyor who ran the line when the first purchase was consummated, in accordance with whose calls the first purchaser's deed was made, made a mistake in his initial point of survey, and thereby so ran the line in controversy as to deprive the first purchaser of a strip of land which he had bought, eighty varas wide; yet, in a controversy between the first purchaser and the subsequent purchaser of the remainder of the survey, who bought in ignorance of the mistake, the footsteps of the surveyor for the first purchaser must be followed, as the second purchaser was entitled to hold to the dividing line as actually run. *Blassingame v. Davis*, 68 T. 595.

When the application of the established rules by which the true location of the boundary of a grant leads to contrary results or confusion, that rule must be adopted which is most consistent with the intention on the face of the grant, read in the light of all the surrounding facts and circumstances.

The same rules in regard to the lines and corners of other surveys called for in a patent cannot be applied when it clearly appears that no actual survey was ever made; in such cases it becomes necessary to look to all matters of description contained in the patent in order to determine what particular land was conveyed or intended by the state and the grantee to be conveyed by the patent. *Et*, in such case, from a consideration of all these, in connection with the facts surrounding the parties, and the transaction to which the parties looked at the time the patent issued, the land granted can be with certainty identified, the grant should not be held void; but such matters of description as were evidently given by mistake should be disregarded and effect given to the calls which are certain and are found—which, in connection with other matters of description contained in the grant, will make it conform to the evident intention of the parties. The language used in the patent should be considered with reference to the understanding of the parties at the time it issued.

When the line or corner of another survey is called for in field-notes made without an actual survey on the ground, such lines or corners, if called for by mistake, should be disregarded, when to observe them would be inconsistent with all the other calls, which are found on the ground, inconsistent with the course

and distance called for, and with the manifest intention of the parties, as ascertained by considering all the calls in the grant, and the facts surrounding the parties and regarded by them when the grant was made. *Lilly v. Blum*, 70 T. 704.

If a surveyor, in running from a base line a dividing line between lands set aside from the same original survey to joint owners, reaches the river on which the land fronts, he may go around a bend of the river and continue his dividing line from a point on the continuation of his course so as to give to each tract its proper portion of land. On a question involving the true location of such division line, the surveyor being dead, a charge, which as matter of law would require the original line to terminate at the point where the river was first reached from the base line, would be error.

Where there is evidence as to what a surveyor actually did in making a survey, the custom of surveyors under like circumstances to do or not to do the same thing, cannot be shown. *Tucker v. Smith*, 68 T. 473.

Primarily the land granted must be identified by the description given of it in the grant. The dignity or importance of the calls usually employed in the grants, surveys and entries of land have been graded or classified by the courts, and it is now settled that the highest in importance and weight is natural objects, as rivers, creeks, etc.; second, artificial objects, as marked lines, monuments, etc.; third, course and distance. But, as said by Justice Roberts, in *Booth v. Upshur*, 26 T. 70: "The lowest grade, course or distance, is made to prevail over the highest grade, when, upon applying the calls of the grant to the land, the surrounding and connected circumstances adduced in proof to explain the discrepancy, show that course or distance is the most certain and reliable evidence of the true locality of the grant." To the same effect are *Booth v. Strippleman*, 26 T. 441; *Stafford v. King*, 30 T. 257; *Davis v. Smith*, 61 T. 21; *Fagan v. Stoner*, 67 T. 287.

If the evidence in the case, from all the surrounding and connected facts and circumstances, satisfied the jury that the true locality of the grant could be more certainly found by running course and distance called for in the field-notes from each corner as they might find to be marked and established on the ground than by observing the calls for natural or artificial objects, then it was their duty to have so determined, and they should have been so instructed by the court. It should not have been left to the discretion of the jury whether they would do so or not. *Bigham v. McDowell*, 69 T. 100.

When a survey calls for a known and established corner of another survey, in the absence of proof that an actual survey was made and that the corner was not actually reached, but was called for by mistake, the distance must be made to yield to the call for the corner. *McAninch v. Freeman*, 69 T. 445.

A surveyor intending to include all the unappropriated land embraced between surrounding surveys, platted his survey in his office, without going on the ground, and called in his field-notes for the older contiguous surveys as its boundaries. He was mistaken as to the true location of the older surveys, and thus the office surveys, though they would include no more land than was intended, would not be changed in their configuration, if bounded by the older surveys as they were established on the ground.

Since there was no material excess of land over the amount called for, by permitting the junior survey to appropriate all the land surrounded by patented lands called for in the field-notes, the lines of the older survey must constitute the boundary of the junior survey calling for them. *Moore and Wife v. Reiley*, 68 T. 66.

It is competent for a witness who saw an original survey made, on an issue involving the location of a line on the ground, to testify to what the surveyor did in running out the survey, though it may result in showing that in running the lines he reversed the course called for in his field-notes. It is immaterial when the course is the same called for, whether it was run from one end of the line or from the other end, and reversed, when for the purpose of identifying the line, it is sought to trace the footsteps of the surveyor. *Smith v. Leach*, 70 T. 493.

(51) One may recover as damages for a breach of contract requiring the delivery of specific articles on a day certain, when time is of the essence of the contract, such expenses as a man of ordinary prudence would incur in preparation to receive them, acting in the belief that they would be delivered. *Chatham v. Jones*, 69 T. 744.

(52.) Unless a contrary intention can be clearly ascertained from an inspection of a contract under which liquidated damages is claimed, courts will not recognize an agreement to pay a sum, on its breach, largely in excess of actual damages sustained, as liquidated damages; yet in every case the intention of the parties must govern.

When it can be clearly ascertained from the terms of a contract that liquidated damages were to be paid in a sum agreed on, in the event of its breach it will be so enforced. In an executory contract for the sale and delivery of cattle, fifty thousand dollars was to be paid in installments; the first was to be at sixty days for eight thousand dollars. The note for eight thousand dollars contained this language: "It is agreed by me that the above amount (eight thousand dollars) shall act as a forfeiture in the event I shall abandon the trade." The contract provided as follows: "The first note for eight thousand dollars, due in sixty days from the date hereof, is to act as a forfeiture and be forfeited by the said (obligor) in the event that he abandon this trade." *Held*, that on a breach of the contract the vendor was entitled to recover the eight thousand dollars as liquidated damages. *Eakin v. Scott*, 70 T. 442.

(55.) A wrong-doer is liable in damages for all the injurious consequences of his tortious acts, which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may usually be supposed to have foreseen and anticipated.

When a telegraph message is sent which contains nothing to indicate apprehension of the sickness of a relative to whom it is directed, and no such information is given to the agent of the company who transmits it, the mental suffering that may be occasioned by a failure to transmit or deliver it, cannot be made a ground for the recovery of punitive damages. *McAllen v. Telegraph Co.* 70 T. 243.

The failure of one who pays a telegraph company to transmit a message to have the same repeated, will not exempt the company from damages resulting from its failure, through negligence, to have the message delivered. And this, though the printed matter on the blank furnished by the company, and on which the message was written, contains a stipulation that the company will only be liable for the amount received for sending the message, if delay should occur in its delivery, unless the message be repeated. The rule is otherwise when the action against the company is for error committed in transmitting the message.

Negligence in a telegraph company, without regard to the degree of such negligence, will render such company liable for actual damage resulting from its failure to deliver a telegraph message.

An assignment of error should be copied in a brief in connection with the proposition predicated on it. *Railway v. Wilson*, 69 T. 739.

(56.) The defendant received from the plaintiff \$1,000, with which to buy land certificates, under a contract providing that two-thirds of the land so located should belong to the plaintiff and one-third to the defendant. The defendant failed to locate the land certificates according to the terms of the contract, and the plaintiff repudiated the acts of the defendant altogether. In a suit for the breach of the contract, the money received by the defendant, with legal interest from the time he received it, is the measure of damages. [*Durst v. Swift*, 11 T. 281; *Sutton v. Page*, 4 T. 147; *Garrett v. Gaines*, 6 T. 443; *Hall v. York*, 16 T. 23; *Mitchell v. McLeomore*, 9 T. 151; *Murchison v. Payne*, 37 T. 305; *Eborn v. Zimpleman*, 47 T. 503; *Close v. Fields*, 13 T. 626.] *White v. Affleck*, 1 U. C. 78.

(56a.) In a suit against a corporation for damages for its failure to deliver bonds under a contract, and to recover the principal and interest due, the plaintiff is entitled, on a recovery, in the absence of evidence as to the value of the bonds, to judgment for the full amount of the bonds and interest. *Railway v. Broussard*, 69 T. 617.

The clause not to overstock the pasture, made in an agreement by the landlord in taking cattle to pasture, is a continuing covenant. That the owner of the stock inspected the pasture and acquainted himself with its capacity before the contract, does not relieve the owner from his covenant against overstocking it, and the consequent damages for so doing. *McAuley v. Harris*, 71 T. 632.

(58.) Damages so remote, that from their character they could not have been considered by the parties as a result of a breach of the contract when it was made, cannot be recovered. *Parks v. O'Connor*, 70 T. 377.

Suit was brought to recover compensation for damages to plaintiff's land and grass by fire escaping from an engine on defendant's road.

In such a case the measure of damages for the destruction of grass is its value on the place where it grew at the time of its destruction, unless the fire resulted in permanent injury to the land, in which event, the difference between the value before the fire and that after the fire must afford the correct measure of damages. In either case interest on such value from the date when the damage was sustained may be recovered. *Railway v. Horne*, 69 T. 643.

(59.) No exemplary damages can be recovered for injury to a plaintiff's business or reputation as keeper of a gambling house, and where he carries on other business in connection with his gambling house, the jury should be so charged as to prevent them from considering the damages to the latter. *Kauffman & Runge v. Babcock*, 67 T. 241.

In a damage suit for the wrongful levying of an attachment, plaintiff can prove his business capacity, good credit, amount of liabilities, capital in business and profits. The value of his credit is a conclusion to be drawn from these facts by the jury, and plaintiff cannot testify what it was worth to him. *Kauffman & Runge v. Babcock*, 67 T. 241.

(60.) It may be difficult to defend upon sound reasoning the doctrine of vindictive damages, now so firmly intrenched in the common law, upon the theory that they are allowed alone for the purpose of punishment and the good of society; but admitting for the argument's sake that the position of counsel upon this point is correct, it must be answered that there are other elements of injury besides "the sense of wrong or insult," which offered a legal basis for exemplary damages, such, for example, as loss of credit and expense of litigation. These injuries corporations may suffer as well as individuals; and hence we conclude that, when a malicious and oppressive trespass is committed upon their property, they have the right to claim such damages, the amount to be fixed by the jury as in other cases, in some proportion to the actual damage and the detrimental consequences to the plaintiff, proved upon the trial. *Railway v. Telegraph Co.*, 69 T. 277.

(61.) It is settled in this state that mental suffering is an element of actual damages where serious bodily injury is inflicted; and where such injury threatens permanent disability, and continues for a long time, the jury are authorized to consider the suffering of both body and mind in assessing the damages, without direct proof of such suffering.

[*Texas & Pacific Railway Company v. Murphy*, 46 T. 356, followed.]

Danger resulting from negligence is not one of the ordinary risks of operating dangerous machinery. *Brown v. Sullivan*, 71 T. 470.

Injury to feelings, caused by a negligent failure to deliver a telegram relating to domestic affairs, is an element of actual damages.

If the inexcusable negligence of the servants of a telegraph company is found to be the proximate cause of injury, damages may be recovered without regard to the degree of care disregarded in the negligence of the employees.

In suit for damages, resulting from injury to wife, the death of a still-born infant, and grief of the mother occasioned thereby, could not form any basis for or element of damages.

If the death of the child aggravated the mother's illness, it was a subject of inquiry into extent of and the injury to the mother thereby increased. *Telegraph Co. v. Cooper*, 71 T. 508.

(66.) When it has once been established that there has been a fraudulent representation by which one has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. The perpetrator of the fraud is liable for the injury caused by his falsehood to one who acted in the belief that the representation was true. *Labbe v. Corbett*, 69 T. 503.

(67.) Without regard to the character of negotiations which precede a sale of chattels, no sale is finally consummated until both parties agree to their delivery. Until such mutual agreement, any false representation made by the purchaser, fraudulently designed to induce a consummation of the purchase by delivery of the goods, will entitle the vendor to a rescission of the contract. *Bohrbough v. Leopold*, 68 T. 254.



(70.) In a suit involving the good faith with which a sale of goods was made, which was attacked for fraud, the answers of the vendor in his own behalf, regarding his motives in selling, are admissible in evidence. *Brown et al. v. Lessing et al.*, 70 T. 544.

To maintain an action for malicious prosecution it must be shown that there was a prosecution; that it was malicious; that it was without probable cause, and that the prosecution is at an end. [*McManus v. Wallis*, 52 T. 535; *Usher v. Skidmore*, 28 T. 617; 2 *Greenleaf's Evidence*, 452.]

It is error to so frame a charge as to practically withdraw from the consideration of the jury a fact in evidence which they might legally consider in determining the existence of probable cause for the prosecution.

The fact that the prosecutor acted, after a full statement of all the facts, on the advice of counsel that an offense had been committed, though admissible in evidence for the defendant, is not conclusive of the question of malice. Whether there was malice, and the want of probable cause, must be determined by the jury from a consideration of all the facts. *Glasgow v. Owen*, 69 T. 167.

When in an action to recover exemplary damages for wrongfully suing out a writ of attachment, it appeared that the affidavit for the writ was made by an agent of a non-resident plaintiff, who was made a party defendant with his principals, it was error to charge the jury that if the defendants, or either of them, had no probable cause for suing out the writ, and were actuated by malice or evil motive in the issuance and levy of the writ, the plaintiff would be entitled to a verdict against all the defendants for exemplary damages. *Tynburg & Co. v. Cohen*, 67 T. 220.

Where a sale is attacked as being in fraud of creditors, it was not error to permit the vendor, when called as a witness to support the sale, to be asked: "Did you sell for any other purpose than to pay your debts?" nor to allow his answer, "that he sold for no other purpose." *Sweeney v. Conley*, 71 T. 543.

Subsequent publications of the libel, or other like publications, are admissible to show the animus of the defendant. *Behee v. Railway*, 71 T. 424.

When the publication is privileged and believed to be true, the *prima facie* case of libel from the false and defamatory publication is deemed to have been fully met, and malice in fact must be established by other evidence, as by the style or manner of the writing or by extraneous facts.

Malice may be proved by circumstantial evidence, and in such cases malice is inferred from the evidentiary facts.

The court, after defining express malice to be a "bad, wicked or evil intent," instructed the jury that such malice "could not be presumed, but must be proved like any other fact." *Held*, error, in that from the latter clause the jury might have understood that malice could only be established by direct evidence.

The court should not indicate to the jury any fact from which they could infer malice, but they should be informed that it could be inferred from facts and circumstances. *Behee v. Railway*, 71 T. 424.

(73.) When, by the use of ordinary care, in testing the strength of machinery or implements, placed in the hands of an employé of a railway company, with which to labor, its weakness and dangerous character for the work to be done could have been ascertained, and injury results to such employé from such defect, the company will be chargeable with notice of the defect and consequent liability in damages for the injury. *Railway v. Silliphant*, 70 T. 623.

Though evidence of mental suffering, naturally resulting from an injury, is sometimes admissible to show actual damage, yet, when it results from apprehension that the sufferer cannot make a support for his wife and children, he cannot, in a suit for damages for personal injury, be questioned regarding such apprehensions as a basis for damages. *Railway v. Douglass*, 69 T. 694.

In an action for damages where death has resulted, or where the capacity of the person receiving personal injury is entirely destroyed, evidence is admissible to show the probable duration of the life of the injured party, had no injury been inflicted, and the value of an annuity for the life of such person, calculated on the basis that he earned a designated sum per annum. Unless the capacity of the party to earn money was entirely destroyed by the injury, such evidence is not admissible. *Railway v. Douglass*, 69 T. 694.

The neglect by a railway company of a statutory duty, whereby injury results to another, is negligence as matter of law, and it is proper that a court should so

charge; but it is improper to charge upon the effect of isolated facts in evidence as constituting negligence or not. Concerning these the jury determine from a consideration of all the surrounding circumstances in evidence before them. *Railway v. Kuehn*, 70 T. 582.

Negligence, except in the failure to perform a statutory duty, is rarely a question of law. Being generally a question of fact, it is not proper to direct the jury what specific facts would constitute contributory negligence. Contributory negligence, on the part of a defendant, must, like negligence (when it does not arise from violation of a statutory duty), depend upon the facts of the particular case, of which the jury should judge under general instruction. *Railway v. Greenlee*, 70 T. 553.

Before an act can be deemed as negligent *per se*, it must either have been done in violation of a statutory duty, or must in its nature be so violative of common prudence, that, without doubt, no prudent man would have committed it. *Railway v. Gasscamp*, 69 T. 545.

The starting of a train without the usual bell ringing or whistle from a flag station on a railway where trains do not usually stop unless signaled, whereby one who had left the train during its temporary stopping at midnight was injured in the effort to return to it, is not negligence *per se*. Whether negligence did in fact exist should be determined by the jury from a consideration of other facts in evidence. *Railway v. Cooper*, 70 T. 67.

Whether the existence of negligence shall be determined as a conclusion from a given state of facts is a matter of fact to be determined by a jury, unless the things done or omitted are so palpably in disregard of common prudence that a court would not hesitate to say that they constitute negligence.

It cannot be said as matter of law that the failure of a contracting party to read a written contract which he has signed was negligence when though able to read he could not do so without the use of spectacles, which he did not have, and when he relied on the false representations of the other party as to the contents of the written contract.

When a written contract has been fraudulently written or changed so as to permit the delivery of specific articles at a later date than that really agreed on by the parties, a waiver of claim to have them delivered at the true date will not bind the one who is to receive to wait for delivery until the date fraudulently inserted, unless it be made clear that the waiver was thus understood by both parties.

If one having no other way to reach the neighboring town where he transacts his business, than over a railway bridge where the county road crosses the railway track, is injured in attempting to cross such bridge, the fact that he had reason to believe the bridge was unsafe before attempting to cross it, it being used by the public at the time, does not furnish conclusive evidence of his contributory negligence. In such case the question of his negligence must be determined by the jury. *Chatham v. Jones*, 69 T. 744.

The duty of one in charge of a passing railway train to stop its progress on account of the proximity to the track of one in advance of his train, does not arise until it becomes manifest that such person intends to go upon the track in front of the train. *Railway v. Kuehn*, 70 T. 583.

When the ordinance of a city under which a street railway company is incorporated makes it the duty of the driver of a street railway car to keep a vigilant look-out for all persons approaching the railway track, and to stop the car on the first appearance of danger, a failure to perform this duty, followed by injury to one near the track, is of itself an act of negligence.

The term gross negligence includes every lesser degree of negligence, and when it is charged in a petition to recover damages for injuries alleged to have been caused thereby, evidence of any character of negligence is admissible.

When one is injured by the negligence of another, the exercise of ordinary caution by the injured party to avoid the danger is all that the law requires, in order that he may be protected against the consequences of having contributory negligence imputed to him.

Though the negligence of one who has been injured by another may have contributed to the injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand to prevent the injury, the failure to use such means must be regarded as the proximate cause of

the injury, for which the person inflicting it is liable, although the injured party was guilty of contributory negligence. *Hays v. Railway*, 70 T. 602.

When a person inadvertently omits or fails to do some act required in the discharge of a legal duty to another, whether such duty arises from contract or from the nature of the employment in which the person is engaged, then such an omission constitutes actionable negligence, if, as an ordinary or natural sequence, it produces damage to another.

The omission may be classified as gross or slight negligence, or simply as negligence, or as failure to use the highest, ordinary or slight degree of diligence, but the legal obligation, at all events, to make compensation to the injured person exists if the omission was a breach of duty and the proximate cause of the injury. What facts will constitute that diligence which the law requires, must depend on the circumstances of each particular case. The omission must be considered in relation to the business in which the person, whose duty it is to exercise care, is engaged.

If the business be one hazardous to the lives of others, the care to be used must be of a nature more exacting than required where no such hazard exists; the greater the hazard the more complete must be the exercise of care.

The exercise of that care requisite to the discharge of a legal duty towards an adult person of intelligence, and not wanting in physical ability to take care of himself, if exercised towards a child of tender years, wanting in intelligence and ability to take care of itself, would often amount to what is usually termed gross negligence. A railway carrier of passengers may, without subjecting itself to the charge of negligence, permit an adult passenger to pass and repass from one passenger car to another while in motion, or to select his own seat or position in a car, if there be not some danger in the position not open to the observation of the passenger; but were an infant of tender years and without discretion, traveling with its parents, to escape from their control, and to attempt to do the same things, it would evidently be the duty of the servants of the carrier, if they knew of it, to restrain the acts of the infant in those respects, or from any other from which injury to it was likely to result; and a failure to do so would be negligence, which would render the carrier liable for any injury that might result from such neglect.

It is frequently said that a carrier of passengers is bound to exercise a high degree of care for their safety; and that, for an injury resulting to them from what is termed negligence or slight negligence, the carrier will be liable; and that the duty to exercise extreme care results from the contract of carriage, express or implied. This is true, but it is not the whole truth, for the duty arises from the hazardous character of the business, and the fact that human life is imperiled by it. The contract creates the relation of carrier and passenger, but that is not the main source from which springs the duty of the carrier to exercise a high degree of care.

It has sometimes been said that a carrier owes no duty to persons other than passengers and employes, other than that it must not intentionally, willfully or wantonly injure them. This doctrine has not been sanctioned in this state.

Ordinary railway companies, running cars propelled by steam, have the exclusive right to the use of their tracks, except at such places as they are intersected by public crossings or such private ways as they may permit, and they may, therefore, expect that no one will violate this right, and may rely upon a clear track, but it is very generally held that, notwithstanding this, such is the hazardous nature of the business in which they are engaged, it is the duty of such carriers, not only for the safety of their passengers, but for the safety of any one who may be on the track, to keep a look out. Street railways have no exclusive right to the use of the part of a street covered by their track, but all persons have the right to use the street for the purposes for which streets are ordinarily used, and, from this fact, such companies may expect that other persons will use the street, as they have the right to do, and it is, therefore, incumbent upon them to ascertain whether the track be clear.

This duty the law casts upon them as one of the conditions on which they are permitted to use streets, which to some extent they divert from the more ordinary uses, for the private advantage of the carrier, as well as the public convenience. This duty is as firmly fixed on this ground, and upon the ground of the hazardous character of such a business conducted in the street of a town or city,

as is the duty of the carrier of passengers by steam, fixed by the hazard of that business to human life, or by the contract for carriage.

If a person be seen on the track of either class of railway, it may be assumed, if the person be an adult, that he will leave the track before the train or car reaches him, and this presumption may be indulged as long as danger does not become imminent, but no longer. From the time that danger is seen to be imminent it becomes the duty of such a railway company to use the highest degree of care to arrest it, and a failure to do so will constitute culpable negligence, which may or may not fix liability, as that question may be affected by the contributory negligence of the injured person. No such presumption, however, can be indulged as to the prudent conduct of an infant of no greater age than was the plaintiff at the time he is alleged to have been injured.

It may be assumed, as matter of law, that it is the duty of a street railway company to know that the track in advance of its car is clear, and that it will be liable for any injury resulting from the want of this knowledge, unless its liability is defeated by the contributory negligence of the injured person, or unless it appears that the person injured went upon its track at a place so near the approaching car that the driver, by the exercise of care, could not avoid the injury after the person was seen, or might have been seen. This involves the proposition that such a railway company is bound to use such diligence as will enable it to know whether the track in front of its car is clear, and if to this end the exercise of the highest degree of diligence is necessary, it must be used.

If it be seen that a person is on the track of such a railway company, in advance of its car, it must use such care as will avoid injury to such person, if this can be done, and for a failure to do so it will be liable for the injury resulting, unless such liability is defeated by the contributory negligence of the injured person. The care requisite to avoid injury in such a case embraces every degree. The charge of a court must be considered in relation to the facts of the particular case.

In the case before us, the uncontroverted fact is that the child was on appellant's track in advance of the car. Whether it was seen by the driver is not shown, but we concur in the opinion of counsel for appellant, after a careful examination of all the evidence, that the driver did not see it. It was his duty to exercise the highest degree of diligence to ascertain whether persons were on the track in advance of the car; and, in so far as the charge complained of affects this question, it was correct. If the driver saw the child on the track in advance of the car, it was his duty to exercise all the diligence then possible to avoid injury to it; and in this aspect of the case the charge was not erroneous. *Railroad Co. v. Hewitt*, 67 T. 473.

A boy passing over a railway along a public street where pedestrians were accustomed to pass, had his foot caught between the rails of the switch and was run over by a passing train. In an action against the railway company to recover damage, *held*: Evidence that a contrivance, simple in its character, which obviated the danger of being thus caught and injured, and which was in use on a few roads of a distant state, in connection with evidence that no safeguards were used by the defendant was admissible, the evidence showing that without some guard the track was dangerous to brakemen and pedestrians, and that the safeguard was a simple, safe and effectual device. See opinion for a charge on the subject, which was held to have been properly refused. *Railway v. Walker*, 70 T. 126.

When it is sought to charge the employer by reason of his having knowingly employed an incompetent servant, such incompetency must be shown by general reputation, and not by specific acts. *Railway v. Scott*, 68 T. 694.

If damage results from the derailment of a railway train, caused by the spreading of a reasonably safe track by the passage of another train so immediately preceding the accident complained of, that the trackman could not have notice of the defect in the track, the railway company is not liable. If, however, the defect causing the injury was in rotten and unsafe road-ties, over which the track had spread by the passing of a train, and injury was caused thereby through the derailment of another train following quickly thereafter, the fact that the laborers on the road had no time to discover the defect after the first train had passed, would afford no defense. The liability of the company would result from the act of negligence in permitting rotten ties to remain in the road-bed. *Railway v. Pettis*, 69 T. 689.

When property situate contiguous to the right-of-way of a railroad company is burned by sparks emitted from the company's locomotive engine passing over the road, which ignite the dry grass on the right-of-way, and injury results therefrom, in a suit for damages brought by the injured party, the burden of proof is on the railway company to show that there was no negligence.

This rule as to the burden of proof is satisfied when the railway company shows that it was using, when the fire occurred, on the engine the best mechanical appliances to secure safety from fire, that they were in good repair and operated in a proper manner by a skillful engineer.

No matter how much care is observed in the construction and operation of a locomotive on a railway track, it is always a question of fact for a jury to determine as to whether the failure of the railway company to permit inflammable material to accumulate on its right-of-way was negligence, if it was ignited by sparks from the locomotive and so destroyed adjacent property. *Railway v. Benson*, 69 T. 407.

Where grass is burned from sparks escaping from a passing locomotive engine, negligence will be presumed. If by reason of the appliances to guard against fire which were used, the company has exercised care and prudence, that fact is within its knowledge, and the burden of proof is upon the company to show it.

In such a suit, after instructing the jury in effect that when grass is burned near the right-of-way of a railway company by sparks escaping from its engine, negligence would be presumed, the court further instructed: Such *prima facie* case can only be rebutted by the defendant showing to your satisfaction that at the time in question the engine was properly constructed with the best approved appliances for preventing the escape of fire, and the appliances were all in good repair and condition as regards the escape of fire, or that all reasonable care and caution had been taken to keep them in repair and condition, and that the engine was carefully and skillfully handled as regards the escape of fire;" *held*, there was no error. *Railway v. Horne*, 69 T. 643.

A railway company is liable in damages for injury to the property of another caused by sparks of fire escaping from its engines through its negligence; or which sparks of fire ignite the grass left on the right-of-way of the road, and thus burn up adjoining property. It is negligence in a railway to leave grass and other combustible material liable to be ignited by sparks from an engine on its right-of-way. *Railway Co. v. Hogsett*, 67 T. 685.

An employé, though presumed to take the natural risk incident to the employment, does not assume that risk which arises from the negligence of the employer. *Railway v. Silliphant*, 70 T. 623.

Every employé of a railway company assumes such risk as is naturally incident to the employment. This he must have considered when he was hired, and the company is only liable in damages if he sustains injury when, through its negligence, it has increased the dangers ordinarily incident to the same. See this case for facts under which it was *held* that a railway was not liable in damages for injuries sustained by a brakeman. *Railway v. Dillard*, 70 T. 62.

When an employé continues in the service after discovering defects in the machinery in use connected with the employment which endanger his safety, and which increase the risk ordinarily incident to the service, it is his duty to inform the employer, whose failure to repair in a reasonable time after his promise to do so will relieve the employé from any implied waiver of the defects until after a reasonable time has elapsed after the promise. *Railway v. Donnelly*, 70 T. 371.

A brakeman on a railway train was ordered at night by the conductor to make a coupling on a portion of the road-bed which was completed, though operated for construction purposes only. In doing so, he stepped into a depression in the road track between the cross-ties at a place which had not been filled up, and fell down; in pulling his foot out, the pilot of the engine ran over him, catching and crushing his foot and leg. The only fact shown to relieve the road from liability was that it was not open for general business of transportation. *Held*, that the road was liable for resulting damages. *Railway Co. v. Redeker*, 67 T. 181.

If injury results to a minor from the negligence of his employer, the parent is entitled to a judgment against the employer for damages for the loss of the minor's services caused by such negligence, and incidental expenses resulting from the injury.

If the employment was for a service in its character dangerous, and the minor was employed without the father's consent, his minority being known to the employer, and injury results to the minor in the course of his employment, the father may recover, as damages, the value of the son's services to him which were lost by reason of the injury.

When the father sues in tort for enticing away or harboring his minor child, he must, in order to recover, aver and prove that the defendant knew of the minority. The same rule applies when the father sues for damages resulting from the employment of his son in a dangerous business, and without his consent. *Railway Co. v. Redeker*, 67 T. 190.

Though a telegraphic message is neither prepared, delivered nor paid for in person by the one for whose benefit it is sent, yet if it be prepared, delivered and paid for by others acting for him at his special request, the contract is complete, and the telegraph company having knowledge of its urgency and importance is liable in damages for negligence in its transmission and delivery.

When from the negligent failure to transmit and deliver such a message, prepared and sent at the instance of a mother who desired information regarding the condition of an absent son, the relationship being known to the messenger, she was deprived of knowledge of his death until too late to have the consolation of attending his burial, an action for damages will lie, which may be maintained by the husband alone.

[*Ezell v. Dodson*, 60 T. 331, and *Gallagher v. Bowie*, 66 T. 265, adhered to.]

The message from the son was as follows: "I am very sick; come immediately." *Held*: The agent of the company who received the message, knowing that the relationship of mother and son existed between the parties, was charged from the words of the message with knowledge of its importance and of the anguish which would result from its non-delivery, if thereby in the event of the son's death his mother should be deprived of the consolation of seeing him in his last sickness, or of being present at his burial.

When from the negligent failure of the telegraph company to deliver such a message, the mother was unable to go on the first railway train, which would have transported her in time, and was compelled to go on a later train, which would also have conveyed her in time but for the fault of the railway company, such fault can furnish no defense when such negligence of the telegraph company is shown. In such an action for damages the death and burial should be distinctly averred. *Loper v. Telegraph Company*, 70 T. 689.

A builder is not required to protect himself against loss by fire by insuring the property of another, which he is constructing or repairing; and, if a fire occurs and destroys the structure during the progress of the work, his failure to do so will not be regarded as negligence.

If one undertakes to furnish the material and build a house for another, to be paid for when the work is complete, and the structure is destroyed by fire during the progress of the work, without fault of either party, the builder cannot recover for the material furnished and labor performed.

If, however, the contract be for the builder to furnish material and perform labor in altering a structure already erected, according to specifications agreed on, there being no agreement as to when payment should be made, and, without fault of either contracting party, the structure itself is destroyed by fire when the work of altering has been but partially performed, the rule is otherwise. Under such circumstances the owner must pay the builder a full compensation for the work done and material furnished before the fire. *Quare*, whether this rule would be applied if the owner should reconstruct the house as it was before the remodeling under the contract began, and then demand of the builder to comply with his contract. *Wels v. Devlin*, 67 T. 507.

See facts where it was not error to instruct the jury to find for the plaintiff if the defendant, by his agent, could, by ordinary care, have avoided the consequences of the negligence of the plaintiff; or by direct act of his agents, caused the act which produced the injury complained of. *Brown v. Sullivan*, 71 T. 470.

But it has been held that "where the facts are undisputed, and such that only one conclusion can be drawn from them, then the question is one of law." Still, unless an act or combination of facts are denounced by statute as negligence, courts have rarely felt authorized to withdraw from the jury the decision of the entire facts whether they constitute negligence. *Railway v. Hill*, 71 T. 451.

The message: "You had better come and attend to your claim at once," imparted notice of its purpose and the importance of its prompt delivery, so as to bring such matters within the contemplation of the parties in the contract for its transmission.

The duty of carefulness in the transmission and delivery of such message would not have been more fully indicated to the telegraph company by the insertion therein of the names of the debtors, in absence of testimony showing otherwise.

Failing to collect his notes by reason of not receiving the dispatch, the measure of damages would be the cost of the message, the value of the notes at the time, and eight per cent. interest until day of trial. *Telegraph Co. v. Sheffield*, 71 T. 570.

A corporation is no more liable for the malicious acts of its employé or servant than an individual would be. The unauthorized malicious acts of the agent of a person or corporation will not render the principal liable for exemplary damages, unless the same are ratified by the principal, with full knowledge of the facts. [*Railway Co. v. Donahoe*, 56 T. 163; *Jacobs, Bernheim & Co. v. Crum*, 66 T. 401; *Heidenheimer v. Sides*, 67 T. 34, 35.] *Railway v. Moore*, 69 T. 157.

One who receives injury from the negligence of another, and who neglects to use such means to effect a recovery as a prudent man would under like circumstances, cannot recover for the aggravation of his injuries accruing from such neglect. Yet, if suffering with pain caused by his injuries, he neglects to do that which is most prudent for his recovery, he will not be held negligent if constrained to such neglect to alleviate his suffering. *Railway v. McMannewitz*, 70 T. 73.

Negligence is generally a fact to be found by the jury. When a duty is required by law, the omission of which causes damages for which an action is maintainable, the omission is negligence; but as to whether there is negligence in a particular case causing injury, should generally be left to the jury. Contributory negligence is no exception to the rule. It would have been improper for the court to have instructed the jury, if they found certain facts, the defendant would be exonerated from liability. Whether the existence of such facts constituted negligence on the part of plaintiff, and whether they contributed to the injury complained of, were not questions for the court to decide; they were questions that should have been left to the jury, as well as the existence of the facts themselves. [*Houston & Texas Central Railway v. Wilson*, 60 T. 143; *Texas & Pacific Railway Company v. Levi*, 59 T. 675.] *Railway v. Moore*, 69 T. 157.

The common knowledge and experience of jurors, their acquaintance with the affairs of life and the motives of men acting under different conditions, are specially called into request in determining whether the facts established on trial show negligence. It is proper for the court to refuse instructions upon isolated facts as evidencing negligence or proper care.

The effect to be given to the calling of the name of a station where the train is halting is a fact with others, the effect of which is to be determined by the jury. *Railroad v. Eckford*, 71 T. 244.

(81.) When there is a continuous account consisting of many items, if no appropriation of payment to specific items is made by either party, they will be applied in accordance with the priority of dates of the items of account. If no specific appropriation of payments be made by either party until rights of third parties holding under the debtor had been created of such a character as to authorize against him their enforcement, the creditor cannot so appropriate payments made by the debtor as to affect such rights, if, by a different appropriation, they can be protected.

[*Miller v. Miller*, 23 Maine, 24; *Barker v. Conrad*, 12 Sergeant & Rawle, 304; and *Burgess v. Alter*, 9 Watts, 386, reviewed.]

The right of the debtor to appropriate to specific items payments made on account will be denied when necessary for the protection of one having equities against the debtor, which would authorize against the latter a decree for specific performance of a verbal gift of land. *Willis v. McIntyre*, 70 T. 34.

(82.) When a vendor of personal property, which is in the hands of a third party, gives an order for the delivery of the same, in pursuance of his contract and in payment of a debt, the vendee cannot by agreement with such third party, without the consent of the seller, postpone the date of delivery, so as to allow

the property to remain with the party in possession at the risk of the seller, or impose on him any new duty with regard to its future delivery. If the property is lost by reason of such agreement to postpone delivery, so far as the seller is concerned the delivery will be regarded as complete and the debt discharged. *Garcia v. Gray*, 67 T. 282.

When anything remains to be done by the seller, such as counting, weighing or measuring, the title to the thing sold does not pass when either of these operations is necessary in order to separate the goods from the mass of which they form a part; but when the entire mass is sold, and must be measured, counted or weighed, with a view to the ascertainment of its price, for the purpose of settlement, the title passes. *Boaz & Co. v. Schneider & Davis*, 69 T. 128.

When a contract for the sale of goods is that the goods sold shall be paid for with cash or notes executed by the vendee or a third person, the sale is on condition that the payment be made, and until this is done, the title to the goods remains in the vendor, notwithstanding they may have come into the possession of the vendee, unless it appear that they were delivered to the purchaser with intent to waive the condition of payment. See opinion for facts illustrating the rule, and under which a disaffirmance of a conditional sale by a failing debtor and a subsequent sale of the goods to his wife in payment of a pre-existing debt was, as against the creditors of the husband, sustained. *Lang et al. v. Rickmers*, 70 T. 108.

See facts held sufficient evidence to show a completed sale of cotton in the field unpicked.

The parties to the contract of sale were in the cotton field owned by the vendor. They agreed upon the sale of all the cotton crop on the plantation. The crop was turned over by the vendor to the vendee. Vendor agreed to pick and haul the cotton to a designated gin; the vendee agreeing to haul the ginned cotton, at his own expense, to a designated market. The market price of the cotton was then to be credited upon the notes of the vendor to the vendee for the purchase money of the land upon which the cotton was raised. Held, that a subsequent attachment could not hold the cotton against the vendee, there being no evidence or charge of fraud. *Hopkins v. Partridge*, 71 T. 606.

(86.) In a suit for damages alleged to have resulted from the negligence of defendant, if the plaintiff's evidence shows that the injury was caused by the negligence of defendant, and does not disclose any fact from which a want of care on plaintiff's part might be inferred, then the burden of proof is on the defendant, if he relies on contributory negligence as a defense, to show that the plaintiff was guilty of such negligence. *Railway v. Redeker*, 67 T. 81.

**RULE 13.—Public officers are what they are reputed to be.**

(88.) To constitute a *de facto* officer, he must have such colorable right to the office, the duties of which he undertakes to discharge, as might induce the public to suppose without inquiry that he is *de jure* the officer.

The surveyor of one county, who, as such, assumes in violation of statute to make surveys in another county in which another officer is alone empowered to make surveys, cannot be *de facto* the surveyor of such other county, even though his acts as such be generally acquiesced in and sanctioned by the commissioner of the general land office.

No rights can be acquired under a legislative ratification of an illegal survey as against an intervening survey legally made before the passage of the act of ratification. *Cox v. Railway Co.*, 68 T. 226.

**RULE 14.—The regularity of official acts is presumed.**

(89.) The doctrine announced in *Johns v. Schulz*, 47 T. 578, that it will be presumed the acts of officers of a former government are within and not in excess of their authority; that this presumption, in connection with an undisturbed possession of over forty years, more than twenty of which elapsed while the land to which such officers assumed to extend title was subject to the jurisdiction from which the grant emanated, are sufficient to establish *prima facie* the validity of a grant, followed. *Clark v. Hills et al.*, 67 T. 141.

Under a statute that empowers a county commissioners' court to fix the terms when such court should be held, it must be presumed that a judgment rendered by that court was rendered at a term fixed by the court in the absence of a recital in the judgment that it was rendered at a regular term. *Baldrige v. Penland*, 68 T. 441.



**RULE 15.**—*Courts will without proof take notice of facts of a public or general nature.*

(90.) Courts take cognizance of their own subordinate officers and of their signatures, and this knowledge extends to the acts of the former officers appearing to judicial proceedings in the proper office. *Etter v. Dugan*, 1 U. C. 175.

Courts will not take judicial knowledge of the ordinances of a municipal corporation. They stand on the same footing as private and special statutes, the laws of other states and of foreign countries, and must be averred and proved like other facts. In pleading, the ordinance need not be set forth in *totidem verbis*, but the contents of an ordinance under which a right is claimed should be substantially stated, and not the conclusion of the pleader as to its scope and legal effect. *City of Austin v. Walton*, 68 T. 507.

(92.) A contract to deliver "good, merchantable cattle," means cattle not merely good for purposes of sale, but good in fact, and if at the time of delivery they are infected with a latent disease then unknown to either party, and the purchaser suffers loss thereby, as a proximate result, he is entitled to recover damages. *Park v. O'Connor*, 70 T. 377.

(94a.) The preamble to a legislative act may be looked to in order to ascertain, when doubtful, the general purpose of the act, and may be regarded as the legislative declaration of the existence of a fact therein recited. *Railway v. Jarvis*, 69 T. 527.

**RULE 16.**—*Ancient wills and deeds, more than thirty years old, when offered in evidence, unblemished by alterations, and coming from such custody as affords a reasonable presumption in favor of their genuineness, with other circumstances of corroboration, will be admitted in evidence without proof of their execution.*

(95.) A deed never proven or acknowledged for record, or recorded, may be a valid and effectual conveyance, and is admissible in evidence upon proof of its execution. [28 T. 663.]

A deed, more than thirty years old, is admissible in evidence, without proof of its execution, as an ancient deed, where it is produced by the party claiming under it and entitled to its custody, and nothing is adduced in proof to cast suspicion upon it. *Fletcher v. Ellison*, 1 U. C. 661.

A bounty warrant, forty-six years old, which had been recognized as genuine, and acted on for more than forty-five years, found in the custody of the general land office, where it properly belonged, when free from suspicion on account of anything apparent on its face, was held to prove itself as an ancient instrument, when an affidavit that it was a forgery had been filed, there being no evidence offered to sustain the affidavit. *Shinn v. Hicks*, 68 T. 277.

A power to sell land may be presumed from great lapse of time with circumstances supporting it, in analogy with the presumption of the execution of ancient instruments from lapse of time.

*Watrous v. McGrew*, 16 T. 513, followed; Texas cases collected upon the subject.

*Renick & Cassidy* recovered lands in Texas for *Harrison*, who lived in Kentucky. They had a power to sell for cash and to retain half the money realized. They sold on credit, taking vendor's lien notes, for one-half to H. and one-half to themselves (R. & C.) H. died before the sale, but had conveyed the land to his son. The son settled with R. & C., taking the purchase money notes which were made payable to H. He afterwards collected the money. *Held*, that the transaction subsequent to the sale ratified it, as well the want of authority as the variance from the power in the sale on credit. *Harrison v. McMurray*, 71 T. 122.

Probate courts are courts of general jurisdiction over the estates of deceased persons, and all presumptions are in favor of the regularity of their proceedings. In the absence of proof, after a long lapse of time, the law presumes the proceedings were all regular, and supplies the absence of any necessary fact to sustain the proceedings by the presumption that it existed at the time the proceedings were had, and it is not error to admit in evidence an administrator's deed, over thirty years old, though no report of the sale is shown to have been made by the administrator. *Graham v. Hawkins*, 1 U. C. 514.

When the affidavit of the loss of a deed is filed in a suit through which the party claims title, a certified copy from the record, showing that the deed had

been recorded thirty years, with strong corroborating circumstances of its authenticity, will authorize the introduction of such copy as a copy of an ancient instrument, though an affidavit has been filed impeaching the genuineness of the original. Otherwise, if there be no authentic entry on the record or evidence showing the date of registration. *Brown et al. v. Simpson's Heirs*, 67 T. 225.

The records of a court, if they be in existence, or properly certified copies thereof, are the best and generally the only competent evidence of their contents. But when twenty-five years after the destruction of the probate records and papers pertaining to the administration of the estate, and after the death of the administrator, in a suit by heirs to recover land claimed to have been regularly sold under order of court by the administrator, the production of the defendants' deed from the administrator, made twenty-five years before, containing recitals, which, if true, showed the regularity of the sale, and its confirmation by the court, in connection with evidence that a subsequent administrator returned a purchase money note referred to in the deed on his inventory, and that the note was paid to him, it will be presumed that the court and its officers did their duty, and the validity of the sale was sustained. *White et al. v. Jones*, 67 T. 638.

Generally, where a deed would be evidenced as an ancient instrument, without proof of its execution, the power under which it purports to have been executed will be presumed. [*Harrison v. McMurray*, 71 T. 122.]

Facts held sufficient to support the presumption of a power taken with its age. *Garnier v. Lasker*, 71 T. 431.

An instrument conveying land of minors, signed by one representing himself to be their guardian, is wholly inoperative without the production of the precedent orders of a court of competent jurisdiction in the premises, although it contains recitals of the authority of the guardian, and, therefore, inadmissible as evidence against them. Courts will not presume the existence of the authority to act in such cases in the absence of all proof of the existence of the power and its loss, or destruction, even after the lapse of thirty years. [*Terrell v. Martin*, 64 T. 121; *Tucker v. Murphy*, 66 T. 355; *White v. Jones*, 67 T. 640.] *House v. Brent*, 69 T. 27.

**RULE 17.**—*The existence of a deed may be presumed from possession under claim of title, corroborated by other circumstances.*

(96.) To instruct the jury, if they "believe from the evidence that there were in existence, more than thirty years ago, deeds from S. C. Robertson to Niles F. Smith, and from Smith to John Darrington, to the land described in the petition, and you further believe that Darrington claimed said land and held possession thereof, either by himself or by a tenant, under said deeds, and paid taxes on said land, then you are authorized to presume that said deeds were executed by said Robertson and Smith," is not error. [*Carver v. Jackson*, 4 Peters, 83; *Crane v. Lessee of Morris & Astor*, 6 Pet. 610; *Deery v. Crain*, 6 Wallace, 805.]

Payment of taxes is *prima facie* evidence of possession. [*Williams v. Hillegas*, 5 Pa. St. 492.] *Jackson v. Deslonde*, 1 U. C. 674.

After the lapse of thirty years possession under one who had the written obligation of the former owner for the conveyance of land which recited that the obligor had no claim, right or title to the land, raises the presumption that the conditions of the obligation to convey had been complied with. A judgment of another state, decreeing against the obligor specific performance, is conclusive of the fact that the conditions of the contract resting on the obligee had been complied with by him. *Morris v. Hand*, 70 T. 481.

**RULE 18.**—*A grant may be presumed in support of a just and legal claim from long and uninterrupted possession, consistent with the grant.*

(97.) Whether the laws in force in 1767 required a confirmation by the viceroy of the grants made at Laredo in that year, may be involved in doubt. A confirmation by the viceroy of grants made by the sub-delegates at Laredo, in 1767, will be presumed after so great a lapse of time, during which title has been openly asserted under such grants and possession maintained. *Railway v. Jarvis*, 69 T. 527.

**RULE 19.**—*A fact may be inferred from the proved existence of a relevant fact in the absence of opposing evidence.*

(101.) In the absence of proof to the contrary, the indorsement of a note, in presumption of law, is contemporaneous with the making of it, and the defendant must prove that it was indorsed after it was due, if he would set up defenses which he might make against the payee. [14 T. 355.] *Linn v. Willis*, 1 U. C. 158.

(106.) When a woman gives birth to a fully developed child so soon after marriage as to render it certain that it was begotten before marriage, the legal presumption is that it was begotten by him who became her husband, until such presumption is overcome by some evidence to the contrary. Until this presumption is overcome, the marriage contract cannot be annulled by reason of her pregnancy before her marriage. *McCulloch v. McCulloch*, 69 T. 682.

(109.) The mere possession of a muniment of title is not evidence of title in the possessor. *Shifflet v. Morelle*, 68 T. 382.

Where the ownership of land is alleged in the petition for injunction under oath, and not denied in the answer, the production of the deed under which the plaintiffs claim, with proof of possession to the time of the institution of the suit, is sufficient evidence of title to support the action. [Abbott's Trial Evidence, 634.] *Dwyer v. Hosea*, 1 U. C. 596.

(111.) The equities of the locator of a land certificate, who locates without contract with the owner, do not extend to fixing a right in the land secured by the location, or even to a lien upon it for his compensation. *Grimes v. Smith*, 70 T. 217.

In order to establish a locative interest in a tract of land, it is necessary that a contract for such interest between the owner and locator be proved. This may be shown by circumstantial evidence. *Boone v. Hulsey*, 71 T. 176.

No legal presumption can exist that one who has located a land certificate issued to another, did so under contract which entitled him to compensation in land. No other presumption can be indulged in such case than the existence of a contract for pecuniary compensation for services rendered. *House v. Brent*, 69 T. 27.

(116.) Testimony of witnesses, one that "the last I heard of Mrs. Harms was during the war after the divorce. I understood she lived with a man named Elsemann in 1863 or 1864, in Galveston. There was a report that she was dead, but I cannot say anything about her. I think I heard the report of her death several years ago;" another, that "the last I heard of Mrs. Harms was during the late war." "I never heard of Mrs. Harms after she left old Mr. Harms; that is, since eighteen or twenty years;" and another, that "I have heard nothing from my former wife since the divorce. Anna Necker told me her mother was dead; that a report of her death reached her; that she died not long since. I never inquired as to my former wife in Galveston," is sufficient to prove the death of a party. [2 Wharton on Ev., sec. 1274.] *Schwarzhoff v. Necker*, 1 U. C. 325.

**RULE 20.**—*When parties, or their agents, have embodied the terms of their agreement in writing, neither can, in an action between themselves, except as hereinafter stated, give oral evidence that they did not mean that which the instrument, when properly read, expresses or legally implies, or that they meant something inconsistent therewith.*

(117.) All preliminary negotiations, whether written or unwritten, which have led to the execution of a contract, are deemed to have been merged in it, and the writing which consummates the contract must be taken as expressing the views of the parties.

While contemporaneous writings may be considered, in construing a contract, when they are reciprocally dependent, and the meaning of one cannot be wrought out, without considering the other, they cannot be considered for the purpose of showing that the parties did not agree upon a stipulation, plainly expressed in a writing, which purports to be the final and only contract between the parties. *Milliken v. Callahan Co.*, 69 T. 205.

Though, as a general rule, all previous conversations and agreements pertaining to a contract, which is finally reduced to writing, are merged in the written contract and cannot be given in evidence to vary its terms, yet, when the written

contract is attacked for fraud, as having been fraudulently written and thus signed by one unable to read it, he may introduce testimony of a parol agreement between the parties before the contract was reduced to writing, as a circumstance to establish the fraud. *Chatham v. Jones*, 69 T. 745.

The written terms of an absolute promise to pay, contained in a promissory note, are conclusive of the contract, and cannot be changed by parol evidence that the note was executed with an understanding between the parties that it was never to be paid, and was not to be transferred or assigned. *Dolson v. Ganahl*, 70 T. 620.

When there is no ambiguity in the written contract, its terms must be regarded as expressing the entire contract really agreed on between the parties. Hence the contract of lease is silent regarding the soundness and stability of the building leased, and contains only a covenant to keep the same in repair, parol evidence that the lessor represented to the lessee, when the written contract was made, that the building was secure and safe, will not be admitted in a suit by the lessee to recover compensation for losses sustained by the falling of a defective wall, when there is no charge of concealment or fraudulent representations. *Lynch v. Ortlieb*, 70 T. 727.

**RULE 21.**—*Contemporaneous written agreements in relation to the same subject matter are to be construed together, and when an agreement consists of several distinct stipulations, it is to be construed so as to give effect to all. A contemporaneous parol agreement, consistent with the written agreement, and forming a part of the contract, although not reduced to writing, will be construed in connection with the written part of the contract.*

(118.) One purchasing goods and executing his note for their value may, at the time, contract by parol that he should not be liable on the note if compelled to surrender the goods under legal process, and if sued on the note he may plead the parol contract and failure of consideration as a defense to it; or if he had paid the note he may recover back the money on the parol contract, if compelled to surrender the goods. *Etter v. Dugan*, 1 U. C. 175.

**RULE 22.**—*A written agreement, when the meaning of the words is doubtful, may be read in the light of surrounding circumstances relating to the subject matter of the contract, and parol evidence of custom and usage relating thereto is admissible to show the meaning of the language used.*

(120.) In a controversy as to the boundary of a tract of land, evidence was offered as to a custom among Mexicans by which the bends in a river were held to belong to the owner of the land against which they abutted. It was held that the evidence was properly rejected, as it would alter the legal effect of deeds under which the parties claimed, and have subverted a rule of law governing the construction of such instruments. Proof of custom cannot be admitted when it will have either of these effects. [Citing *Meaher v. Lufkin*, 21 T. 383; *McKinney v. Fort*, 10 T. 220; *Dewees v. Lockhart*, 1 T. 585.] *Tucker v. Smith*, 68 T. 473.

In a contract for the delivery of cattle, when the word "yearlings" is used, it is competent to prove the local custom among stockmen as to age of cattle coming within the meaning of the word. *Parks v. O'Connor*, 70 T. 377.

It is now well settled that custom may control and vary the meaning of words, giving even to such words as those of number a sense entirely different from that which they commonly bear, and which, indeed, by the rules of language and in ordinary cases, would be expressed by another word. [2 *Parsons on Contracts*, 537; *Smith v. Wilson*, 3 B. & Ald., 728; *Hinton v. Locke*, 5 Hill, 437; *Sontin v. Killerman*, 18 Mo. 502.] In the first case cited, when the contract by the lessee was to lease ten thousand rabbits or a warren, it was held that parol evidence was admissible to show that by the custom of the country, when the lease was made, the word "thousand," as applied to rabbit, denoted one hundred dozen or twelve hundred. In the second case a day was shown by custom to mean ten hours, though in ordinary acceptation it meant twenty-four. A man that worked twelve hours and one-half was allowed to charge for one day and one-fourth. In the third a contract to deliver four thousand shingles was held to be filled by the delivering of twenty-five hundred in four bundles of a certain size, it having been

found that the usage of the lumber trade was to regard a package of shingles of certain dimensions as containing one thousand shingles, without reference to the number actually contained within it. The law seems to be that, when there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties. [Hinton v. Locke, 5 Hill, 437] This view is adopted by eminent text writers, and seems not to be disputed by any decision to which we have been referred. [Sanson on Usages and Customs; Browne on Usages and Customs, 30; Lawson on Usages and Customs, p. 367 *et seq.*; Wharton on Evidence, sections 960 and 961a.]

In a contract for printing the ordinances of a city it was provided that "when said work is complete, delivered and accepted, the city is to pay for the same at the rate of \$1.12½ per page for the first one hundred copies, and for each additional copy desired over one hundred they are to pay at the rate of sixty cents per page. The city is to take not less than one hundred and twenty-five copies." Evidence was admitted to show that, according to the usage of printers, the contract meant that the city was to take one hundred copies at \$1.12½ for each page in one of the copies, and twenty five additional copies at sixty cents for each page in one of them. And it was held that this was the proper construction of the contract on its face. Dwyer v. City of Brenham, 70 T. 30.

**RULE 25.**—*Parol evidence is admissible to show that a written agreement is void, for want of failure of consideration, or on account of fraud or mistake.*

(123.) See opinion for facts under which it was held that if one, in consideration of his acceptance of the drafts of another, receive from such other a promissory note for the amount, secured by mortgage, which by subsequent negotiation is converted into a conditional sale, and the drawer of the drafts afterwards conveys the mortgaged property absolutely for the benefit of the acceptor in satisfaction of such notes, the fact that the acceptance was never paid cannot be urged by the mortgagor under plea of failure of consideration to defeat title derived by purchase from the assignee of the acceptor. Harvey v. Edens, 69 T. 420.

**RULE 26.**—*Parol evidence is admissible to show that a deed was intended as a mortgage.*

(124.) The plaintiff, B., was indebted to the defendant, W., upon a note for three hundred dollars, secured by a deed of trust, executed by B. and his wife, upon six lots of ground, in the city of San Antonio, which were the separate property of Mrs. B. On February 20th, 1880, B. and wife conveyed this property to W., by a deed absolute on its face; and about the twenty-fourth of January, 1884, the latter sold it for two thousand eight hundred dollars in cash. This suit was brought by B. and wife to recover of W. said sum of money, less the amount of principal and interest due upon the note and eighty dollars taxes, admitted to have been paid by W. upon the land. The petition charges that, although the deed appeared absolute upon its face, it was intended and understood between the parties thereto to be a deed in trust for the purpose of securing the debt due from B. to W.; that the lots were worth much more than the debt, and the property fast increasing in value, and that they informed W. that they did not wish to sell or have them sold at that time. It was further alleged that W. promised that if B. and wife would vest the legal title in him he would hold the said lots until, in his opinion, they had reached their highest market value, when he would sell them, and, after deducting his debt and interest, and such taxes as he should have paid on the land, would pay the balance of the proceeds of the sale over to the appellees. Confiding in this promise, they made the deed, but, in violation of their trust and confidence in him, W. refused to pay over any portion of such proceeds. It was held that the contract could be enforced after a sale of the land, and vendee compelled to pay over, after satisfying the debt, whatever might remain of the proceeds of the sale. Wiseman v. Baylor, 69 T. 63.

The plaintiff furnished the purchase money for a tract of land. The legal title for it was conveyed to the ancestor of the defendants. *Held*, that the equitable title vested in the plaintiff, and he was entitled to recover the title and possession of the land; such right does not depend upon the existence of an express agreement at the time of the execution of the deed.

By implication equity charges the holder of the title in such case with the duties and liabilities as upon express agreement recognizing the trust. *Burns v. Ross*, 71 T. 516.

**RULE 28.**—*If a written instrument fails, through mistake, either of matter of law or of fact, to represent the true agreement of the parties, or omits or contains terms contrary to the common intention of the parties, a court of equity will correct or reform the instrument.*

(127.) When there is no ambiguity in the language used in the deed, evidence should not be admitted that words were intended to convey a meaning different from that which they ordinarily bear, and which the law, in the connection in which they appear, attaches to them. When, however, the controversy involving the construction of words is between the original parties to the instrument, a mutual mistake may be shown as to the language used to convey the real intent of the parties.

Evidence of a mutual mistake by the original vendor and vendee, made in the description of land conveyed, cannot be admitted to affect the rights of a subsequent purchaser who bought relying on the description given, and in ignorance of the mistake. *Farley v. Deslonde*, 69 T. 458.

**RULE 29.**—*Parol evidence is admissible to establish a separate oral agreement constituting a condition precedent to the existence of an obligation claimed to arise on a written instrument.*

(129.) When an express lien is reserved by a vendor in a deed conveying land given by him in part payment for other land conveyed to him, and such express lien is intended by its terms to secure the vendor against all loss and damage that may result from future claims asserted by others to the land received, parol evidence is admissible in a suit to enforce the lien on account of money expended in defending title, to show that it was understood between the parties when the deed was executed that a third party asserted an adverse title, and would sue to enforce it. *Bumpass v. Morrison*, 70 T. 756.

**RULE 31.**—*The judgment of a court having jurisdiction of the matter and of the parties, is conclusive.*

(131.) A purchaser of property covered by an attachment lien created by a suit in which he was not a party, who bought before the levy of the attachment, is not defeated by a sale under a judgment foreclosing that lien. But a purchaser after the levy of an attachment is a purchaser *pendente lite*; and in case the attachment lien be foreclosed by a judgment against an administrator, which is certified to the county court for observance, a sale under an order based upon that judgment and granted upon an application to which he was not a party, will conclude his right. *Paxton et al. v. Meyer*, 67 T. 96.

The holder of a county warrant is not charged with notice of any order made by the court with regard to it, after the order directing its issuance. *Leach v. Wilson County*, 68 T. 353.

(133.) One who maliciously and without probable cause puts in operation the machinery of judicial proceedings under which an arrest and trial is had, thereby incurs liability from which, when sued for malicious prosecution, he is not relieved by the fact that the subsequent proceedings in the prosecution so begun, and in a court having jurisdiction, were so irregular that, had a conviction resulted, the judgment would have been a nullity.

In a suit for malicious prosecution, based on the voluntary affidavit of the defendant, which put in motion a prosecution in a United States circuit court, resulting in trial and verdict of not guilty, the fact that in the opinion of the Texas court trying such suit for malicious prosecution the United States court had no jurisdiction to try the cause, will not be sufficient to exclude the transcript of the prosecution proceedings when offered in evidence for the purpose of showing the

affidavit, the information based thereon, and the verdict and judgment of not guilty. *Ward v. Sutor*, 70 T. 343.

(135.) In a suit on a promissory note *res adjudicata* was pleaded to defendant's plea of payment, in which it was set forth that the same charges and items of payment made in produce, pleaded in the pending suit, were set up in another suit upon other notes, also payable in produce, given for the purchase of the land, and that those items of payment were considered, settled, paid off, and discharged by the judgment rendered in that cause; *held*, that to render the plea of *res adjudicata* good, it was necessary that it should have negatived the idea that the note in suit was taken in consideration in the former action in determining how much of the produce paid was to be applied to and the liquidation of the notes sued on in that action.

A judgment which is competent to establish a plea of *res adjudicata* cannot be defeated when relied on for that purpose by a writ of error prosecuted for its review. *Thompson v. Griffin*, 69 T. 139.

A judgment which contains recitations declaring service of citation on the defendant, cannot be attacked in a collateral proceeding by showing that no legal service was in fact made. *Davis v. Robinson*, 70 T. 394.

Suit was instituted in trespass to try title against a vendee for part of a tract of land. He made his vendor a party, alleging a warranty, but that the deed had been altered so that the warranty did not appear in it; the vendor denied the alleged alteration, and on trial plaintiff recovered, and, as between the original defendant and his vendor, the judgment was that defendant take nothing, and that the vendor recover costs. Subsequently the vendee brought suit on his alleged warranty; the vendor pleaded the proceedings in the ejectment suit in bar. *Held*, the testimony showing the identity of the issue and of the testimony in both trials, the trial judge should have submitted the issue to the jury. *Monks v. McGrady*, 71 T. 135.

Where the record discloses that the former judgment was not rendered in whole or in part upon the cause of action asserted in the second suit, such judgment is not a bar, though the subject of the second suit might have been litigated in the first suit. *Pishaway v. Runnels*, 71 T. 352.

(147.) The courts of another state having jurisdiction of the parties, may exercise jurisdiction in a suit for specific performance of a contract for the conveyance of land in Texas. The fact that they cannot enforce their decrees constitutes no objection to the exercise of jurisdiction. If specific performance be decreed it may render an alternative judgment for money in lieu of the specific act they contracted to be performed. If the decree requires a conveyance of title to land in Texas, it is not effective, unless the owner of the land makes the conveyance in person. *Morris v. Hand*, 70 T. 481.

(148.) The declaration contained in the opinion delivered in *Hughes v. Lane*, 25 T. 356, to the effect that a judgment on demurrer is not conclusive, was not necessary to the decision of that case, and cannot be maintained either on principle or on authority. A general demurrer which admits the facts stated by the plaintiff, when sustained by the judgment of the court, is as conclusive of the cause of action as if the plaintiff had proven them and a judgment had been rendered against him. *Bomar v. Parker*, 68 T. 435.

(156.) Whether the jurisdiction of a court be general or special, it cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The same presumption must be indulged in favor of jurisdiction, whether service be had personally or by publication.

Whenever it appears from an inspection of the record of a court of general jurisdiction that the defendant, against whom a personal decree or judgment has been rendered, was at the time of the alleged service without the territorial limits of the court, and that he never appeared in the action, the presumption of jurisdiction over the person ceases, and the burden of establishing the jurisdiction is cast upon the party who claims the benefit or protection of the judgment or decree. The presumption regarding the attaching of jurisdiction exists when the defendant is shown by the record to have been within the jurisdiction of the court.

Under the statute as it existed in 1867, before the property of a non-resident could be seized and sold under attachment, it was necessary that the attachment

should have been levied on property within this state, and that the service required by law to be given by publication should have been given before the court could acquire jurisdiction to enter a judgment directing the property seized to be sold for the payment of a debt.

[Wilson v. Zeigler, 44 T. 657, reviewed.]

The statute does not contemplate that the seizure of the property of a non-resident by attachment, in a suit by publication, is notice; the notice must be given either by personal service or by publication, and, when by publication, it will not authorize as against a defendant not personally served, and who makes no appearance, a judgment on a new cause of action set up by way of amendment, and of which no notice was given by publication. The giving of notice in the manner pointed out by the statutes is necessary to clothe a court with power to hear and determine the pending cause if there be no appearance. Unless this notice is legally given, no court has power or jurisdiction to order a sale of the defendant's property, though in *custodia legis* by virtue of its seizure under a valid attachment.

The word *jurisdiction*, when its meaning is involved in an inquiry as to whether the judgment of a court is void or voidable, can have but one meaning, and that is the lawful power to hear and determine the matter in controversy. If this power did not exist, and its absence is shown from the record, the judgment rendered in the attempt to exercise jurisdiction is void.

[McRea v. Brown, 45 T. 507; Morrison v. Walker, 22 T. 20; Rowley v. Borian, 12 Ill. 199, reviewed.]

If an attaching creditor, after setting up one cause of action and suing out an attachment upon it, so amend his petition as to set up a new and independent cause of action and thereon takes one judgment, this dissolves the attachment as to subsequent attaching creditors and purchasers.

If a defendant is not brought before the court by process which confers jurisdiction over his person, and does not voluntarily appear, no judgment can be rendered that will bind him personally in an ordinary action of debt, when based on the mere fact that he has property within the reach of the process of the court.

If an attachment lien is lost by dissolution of the attachment the power of the court to render a judgment is lost, unless it has acquired jurisdiction over the person of the defendant.

A judgment rendered on a demand set up by way of amendment in a proceeding by attachment, where service is attempted by publication as to the original cause of action, but not as to the amendment, there being no appearance by the defendant or personal service on him, is a nullity. Stewart v. Anderson, 70 T. 588.

In considering the validity of a judgment rendered by a justice of the peace, it is not necessary that the transcript should show everything prerequisite to the attaching of jurisdiction. [Williams v. Ball, 52 T. 608, followed.] Hance v. Galveston Wharf Company, 70 T. 115.

A judgment erroneous for want of issues by the pleadings will be corrected on appeal, but it is not void. The extent of a decree, within the jurisdiction of the court rendering it, will be determined by its terms alone, and it cannot be restricted in a collateral attack by the pleadings, nor can the preliminary proceedings be examined to extend its effect or enlarge its meaning. Where the plaintiff sued to foreclose a mortgage on several tracts of land, including half of a third league survey, and during the progress of the case the parties submitted the matters to arbitrators, who awarded the whole of the third league survey to the plaintiff, and judgment was rendered accordingly, the decree passed the title to the land. [Freeman on Judgments, 135; Weathered v. Mays, 4 T. 388; Tadlock v. Eccles, 20 T. 791; Withers v. Patterson, 27 T. 491; Vogelsang v. Dougherty, 46 T. 472; Taylor v. Snow, 47 T. 465; Guilford v. Love, 49 T. 740; Kendall v. Mather, 48 T. 598.] Williamson v. Wright, 1 U. C. 711.

**RULE 32.**—*A recital in a deed binds the parties and their privies in suit, founded upon such instrument, or growing out of the transaction in which it is given.*

(166.) An agent controlling two judgments against an estate for different parties, received a conveyance from the administrator, of land, in trust to sell and apply the proceeds of sale to their payment. Afterwards a deed was made by the



administrator to the plaintiff (who was one of the judgment creditors) under order of the probate court, in a proceeding to which said creditor was not a party, which purported to convey other land in full satisfaction of the creditor's judgment. The deed was not delivered to the creditor or accepted by him, but was accepted by the trustee. In a proceeding against the administrator and the other judgment creditors to recover an interest in the trust land, *held*:

1. Neither creditor acquired under the trust deed anything more than a lien upon the land, and a right to demand its sale in satisfaction of his debt.

2. The recitals in the deed to land not embraced in the trust deed, which deed was never accepted by the creditor, could work no estoppel of his rights under the deed of trust. *Stephenson v. Martin*, 68 T. 483.

**RULE 33.**—*The admissions of a party or his agent are admissible in evidence when offered by the adverse party.*

(167.) A principal is not bound to take notice of facts coming to the knowledge of his agent before the agency existed. *Dawson v. Sparks*, 1 U. C. 735.

The rule is well established that the declaratives of an agent are only admissible as to matters within the scope of his authority; and only as the transactions then going on, and not as to past events. *I. & G. N. Ry. Co. v. Ragsdale*, 67 T. 24.

One who by contract is to receive specified articles, he being present at their delivery, and who seeks to avoid liability on his contract by reason of the existence of a latent defect which impaired their value and operate a fraud upon him, is not chargeable with the knowledge of the defect that may have been known at the time by his employé, whose only duty was to take charge of and transport the articles. *Labbe v. Corbett*, 69 T. 503.

Declarations of agents making sale of personal property as to its qualities, etc., bind the principal. *Aultman v. York*, 71 T. 261.

The owner of a promissory note, payable to the paying teller of a bank, and indorsed by him in blank, delivered it to such teller for collection, to be held by him as an agent of the bank. The teller collected the money on a check given for it and payable to his bank, and caused the same to be entered on the books of the bank to his individual credit, concealing from the owner the fact that the money had been collected. The teller died insolvent and a defaulter to his bank. No other officer of the bank knew of the acts of the teller in collecting and appropriating the money to his own use. In a suit by the owner of the note against the bank, *held*:

1. It being shown that the teller had in other transactions made collections for others as an officer of the bank, and the collection being within the scope of his apparent authority, it was immaterial whether the collection was really within the scope of his authority or not, and the bank would be bound by his acts.

2. The public is not supposed to have notice of the apportionment of duties relating to bank matters among bank officers. The knowledge of its teller in regard to the collection of money must be regarded as the knowledge of the bank, and notice to him is notice to the bank.

3. When a bank holds out its officer to the public, by his employment, as worthy of confidence, it cannot profit by the frauds he perpetrates in the apparent scope of his employment. *Bank v. Martin*, 70 T. 643.

A report filed by the treasurer, after the bond was executed, in accordance with his official duty, and in pursuance of the laws of the corporation, was admissible to show that the money was in his hands after the bond was executed, but the sureties could show that the report was untrue. [*United States v. Boyd*, 5 How. 50; *Keowne v. Love*, 65 T. 158, etc.]

A check book used by the treasurer in his private business, containing stubs showing that drafts had been drawn by him at certain times, was inadmissible for the purpose of showing when funds had been converted by him. *Barry v. Screwmen's Association*, 67 T. 250.

Statements of the husband concerning the wife's separate property, made when she was not present, are not admissible in evidence against her, in a suit brought by the wife for the property. [8 T. 178; 14 T. 583.] *Smith v. Redden*, 1 U. C. 360.

When the issue is whether the land in controversy was purchased and paid for with the money of a deceased party, who was the apparent owner, his declara-

tions to the effect that the land was purchased and paid for by him, are not admissible in behalf of those claiming under him. *Gilbert v. Odum*, 69 T. 670.

In a suit involving a question of priority of liens in which the respective claimants are co-defendants, the admission of one as to a question of indebtedness between themselves, is competent, but not when it is introduced to affect the claim of the plaintiff who was not present, and whose rights are sought to be affected thereby. *Overstreet v. Manning et al.*, 67 T. 657.

**RULE 34.**—*Declarations made by a party or by third persons, at the time when an act is performed, and as part of the transaction, are admissible in evidence as a part of the res gestæ for or against the person who does the act.*

(168.) The declarations of deceased parties who were disinterested, and in position to know the true location of the lines of a survey made upon the ground and in view of the objects identified by them, are admissible to establish boundary. *Tucker v. Smith*, 68 T. 473.

The declarations of a surveyor who is dead, which were made at a time when he was attempting a survey of a tract of land not originally surveyed by him, of which he had no previous knowledge, and which relate to his opinion regarding the identification of corners and lines of the survey, are not admissible in evidence. His declarations as to distances then measured by him from designated objects would be admissible. Where it is shown that the surveyor was in a position to know the truth of his declarations from having made the original survey, or from other knowledge possessed by him, the rule is different. *Russell v. Hunicutt*, 70 T. 657.

Declarations of persons in possession of land, explanatory of the character of their possession, are admissible in evidence. [1 Greenl. Ev., sec. 109; Wharton on Ev., 1156; Abbott's Trial Ev., 711.] *Jackson v. Deslonde*, 1 U. C. 674.

The declarations of a deceased vendor, made at the time he parts with possession of a deed, are admissible, in a suit to which his executor is a party, in evidence, on an issue as to whether there was then a purpose to deliver the deed in consummation of a sale; his subsequent declarations, made after the registration of the deed, are not admissible, being no part of the *res gestæ*. *Steffan v. Bank*, 69 T. 513.

The declarations of a vendor, made at the time of purchase, that a street abutted on one of the lines of the land sold, are admissible against his heirs who claim title to show a dedication of the ground by the ancestor to public use. *Burnett v. Harrington*, 70 T. 213.

Letters or declarations of a vendor, made after his conveyance of title, are not admissible in disparagement of the title conveyed. *Smith v. McElyea*, 68 T. 70.

When the original vendee, under a deed claimed by a *cestui que trust* to have been made upon a trust enuring to his benefit, was permitted to show in evidence the declarations of the grantor, uttered several days before the deed was executed, and for the purpose of defeating the trust, the *cestui que trust* was entitled to show the declarations of the vendor, made the day before the deed was executed, for the purpose of establishing the trust.

In determining the character of the trust, the declarations of the vendor, made with the knowledge and concurrence of the vendee, before the deed was executed, may be looked to in connection with the subsequent acts and declarations of the vendee before the trust was repudiated, but the declarations of the vendor, made subsequent to execution of his deed, are never admissible evidence to show the intent with which he made the deed.

In determining the question as to whose benefit a verbal trust arising on a deed absolute on its face should enure, all the declarations of the grantor, made before the deed was executed, and the acts of all the parties who participated in the transactions which may have led to the making of the deed, as also the subsequent acts and declarations of the trustee, may be considered. *Smith v. McElyea*, 68 T. 70.

Declarations of a party in his own favor are not admissible in evidence, when not made in the presence of his adversary, as to admit them would be to permit a man to manufacture evidence in his own favor. [Wharton on Ev., 1077.] *Solomon v. Huey*, 1 U. C. 265.

The declarations of a vendor made after the sale are not admissible to affect the title to the property sold, when offered in controversy between third parties involving the ownership of the goods. *Boaz & Co. v. Schneider & Davis*, 69 T. 128.

In a suit to rescind a contract of sale of goods alleged to have been purchased with fraudulent intent, brought against the purchaser and his assignee, the declarations of the purchaser made soon after the purchase, which tend to show his fraudulent design and misrepresentations in effecting the purchase, are admissible in evidence for that purpose. *Rohrbough v. Leopold*, 68 T. 254.

Ordinarily declarations of a principal in an official bond, when not made in the course of his official duty, are not admissible in evidence in a suit against the surety. *Screwmen v. Smith*, 70 T. 168.

The declarations of the payee of a note made after maturity, and while he owns and holds the same, when made against his interest, are admissible against a subsequent assignee. *Wagoner v. Ruply*, 69 T. 700.

The declaration of a third party relative to the facts connected with an accident resulting in damage to plaintiff who sues to recover damages, when made ten minutes after the accident by the narrator, who was present with the plaintiff when the damage was inflicted, are not admissible as part of the *res gestæ*. Neither can they be received as implied admissions by the plaintiff, who was present when they were made and did not contradict them, he being unconscious at the time. *Railway v. Moore*, 69 T. 157.

The replies to a messenger with a telegram made at the office of the party to whom the telegram is directed, touching his whereabouts, are admissible upon issue of negligence on part of the telegraph company in delivering the message. *Telegraph Co. v. Cooper*, 71 T. 508.

As to what is *res gestæ* depends much upon the circumstances of each particular case. The doctrine is based on the presumption that declarations made at the time of the act, or transaction, or the event to which they relate, evoked by it, without premeditation, are part of the act, or transaction, or event. To be a part of the *res gestæ*, the declarations are not required to be precisely concurrent in point of time with the principal transaction, if they spring out of it, tend to explain it, are voluntary and spontaneous, and are made at a time so near as to preclude the idea of deliberate design. [*McGowan v. McGowan*, 52 T. 657.]

The rule is very latitudinous, and its application must be left largely to the judicial discretion of the trial court. Where the circumstances of the case render it probable that a statement offered as *res gestæ* is the result of premeditation or deliberate design to effect a certain purpose, it should not be received. *Pilkinton v. Railway*, 70 T. 226.

A witness was permitted to state that the deceased, a short time after he was injured, in answer to an inquiry as to how he came to get hurt, said that "he jumped off the cars and went to make a coupling, but as he went to come out his leg got fastened under the rail; that he could not get it out, and they ran over him." We are of the opinion that his declaration was not *res gestæ*, and should have been excluded. [*Waldell v. Railway Company*, 95 N. Y. 276; *Martin v. Railway Company*, 9 N. E. Rep. 505; *The State of Estoupe*, 1 S. Rep. 448; *Mayes v. The State*, 1 S. Rep. 733, this question is very fully discussed, and the authorities cited by Justice Clifford in *Insurance Company v. Mosley*, 8 Wallace, 409.] *Railway v. Crowder*, 70 T. 222.

(170.) In a suit against a corporation to recover exemplary damages for the perpetration of a willful trespass, the declarations of an employé of the defendant, which indicate his own reckless indifference to consequences regarding the trespass, are not admissible. *Railway v. Telegraph Co.*, 69 T. 277.

After a railroad disaster, the conversations of bystanders and declarations by the servants of the railroad company, narrating the cause and circumstances of the disaster, and made within an hour or two after the wreck, are not *res gestæ*, and should have been excluded. *Railway v. Ivy*, 71 T. 409.

**RULE 35.**—*Hearsay is competent evidence to prove pedigree, relationship, marriage, death, and boundaries.*

(171.) The improper admission of hearsay testimony is not ground for reversal on appeal when the same fact was established by other testimony not objected to. *Railway v. Mackie*, 71 T. 492.

Where an attachment is based on the ground that defendant was about to remove his property, or a part of it, out of the county, for the purpose of defrauding his creditors, and the defendant claims exemplary damages for suing out the writ, the declarations of third parties made to the plaintiff, which from their

nature would naturally have influenced his action in procuring an attachment, and having reference to the honesty of defendant's intentions, are sometimes admissible to show that the writ was not sought to oppress, but was applied for in good faith. *O'Neil v. Wills Point Bank*, 67 T. 36.

General reputation in regard to the boundary lines of an ancient survey, formed long before the suit in which it is offered in evidence was begun, and which boundary was of sufficient interest to have been the subject of note and comment in the neighborhood, is admissible in evidence. *Clark v. Hills et al.*, 67 T. 141.

A paper filed in the county court by an administrator, who was also an heir of the intestate, and which was filed among the papers pertaining to the administration, recited that since filing the inventory the administrator had become satisfied on information derived from the other heirs that one-half of certain designated property in the inventory belonged "to Louis King." In a suit for the property by one claiming under Louis King, and against a purchaser from the heirs of the intestate, *held*, that the paper was not admissible in evidence. *Gilbert v. Odum*, 69 T. 671.

When a disputed boundary line was coincident with an established line of another survey, made at the same time, a question which sought to elicit the action of a surveyor in running the line of such established survey was proper, and pertinent to the issue. *Tucker v. Smith*, 68 T. 473.

171a. A witness testified that by correspondence with parties named by him, and who were members of the family, he had heard and believed that certain named persons were heirs, etc. In another case a witness testified that a person had told him that a certain named person was dead. *Held*, that the evidence was inadmissible as to the declarations of others, unless they were shown to be dead, and that if the declarant be living, he must be produced in court. *Johns v. Northcutt*, 49 T. 444; *Schwarnshoff v. Necker*, 1 U. C. 325.

**RULE 36.**—*On questions of science, skill or trade, persons in those particular departments are allowed to give their opinions in evidence,*

(172.) On an issue involving the fraudulent alteration of a bounty warrant a witness who, as an officer, had taken evidence of the transfers made by parties claiming under it, and who had witnessed the execution of some of them, was permitted to state: "I know that the land warrant and the transfers attached thereto are all genuine, honest instruments, and entitled to full faith and credit." *Held*, no error; the objecting party had a right, if he desired, to examine the witness and ascertain upon what facts he based his statement that the certificate itself was genuine. *Shinn v. Hicks*, 68 T. 277.

If the finding of a fact by the court trying a cause without a jury is predicated upon the mere opinion of a witness, and the party against whom the fact is found fails to cross-examine the witness to ascertain on what basis of facts the opinion is given, it will on appeal be deemed conclusive. *Burrow v. Zapp*, 69 T. 474.

The sufficiency of a lost deed to pass title cannot be established by the mere opinion of witness who once saw it. He must recollect what its provisions were, and state facts regarding its contents. Among the exceptions to the rule which ordinarily excludes the opinion of a witness, when offered as evidence, cannot be included the long time that has elapsed since the occurrence of the matters about which the witness is called to testify. *Shifflet v. Morelle*, 68 T. 382.

The question of increased risk, in a suit on a policy of fire insurance, is one for the jury, and experts are not permitted to state their conclusions upon the issue whether the risk was increased, when that depends upon facts which involve no peculiar science or information, but are within the common knowledge of men. [*Lyman v. The State Mutual Ins. Co.*, 14 Allen (Mass.) 329.] *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

When it is sought to reverse a judgment on the ground that a witness was permitted to testify as an expert without first being shown to be such, it should be shown by bill of exceptions or otherwise that examination was made touching his capacity to testify as an expert, or that no examination into his qualification was made. Otherwise, the presumption will obtain that the court became satisfied of the competency of the witness. *Hardin v. Sparks*, 70 T. 429.

The evidence of experts should be confined with much strictness within the rules regulating its admission, since, from its very nature, a relaxation of these

rules may lead to great abuses. To illustrate: An expert who sat and listened to conflicting evidence regarding the construction of a jetty, and its effect in changing the current of a river, whereby the plaintiff claimed that his land had been cut away to his damage, qualified himself as an expert, and testified to some (though limited) personal knowledge of the facts. He was asked whether it was his opinion that the jetty produced, or brought about, or had any part in producing any part of the damage described as having been sustained by the plaintiff.

*Held:*

1. An expert could give his opinion on a state of facts pertaining to his art or science which he might assume to be true, and the court and jury must then decide whether his assumption of facts was correct.

2. But he could not give his opinion as an expert, as to his conclusion from facts testified about in conflicting testimony, the existence or non-existence of which should be determined by the court or jury, and not by the expert.

3. If his opinion was desired as an expert, regarding the effect of given facts in producing results, it should have been sought by stating a hypothetical case, and thus his judgment and opinion, on the whole evidence that he had heard, would have been avoided.

4. The answer should have been excluded, for it required the expert to usurp the province of the jury and pass on disputed facts. *Armendaiz v. Stillman*, 67 T. 458.

Though in some instances an expert may give his opinion or conclusion arising on facts, he cannot do so when the character of an act is in question, and can be determined only by the application of rules of law to a given state of facts. A witness cannot give his opinion in a suit brought to recover damages for wrongfully suing out an attachment, as to whether the defendant in attachment ever "did any act or thing to defraud his creditors." Such opinion would involve the conclusion of the witness both as to law and fact, and invade the province of both judge and jury. *Half, Weiss & Co. v. Curtis*, 68 T. 640.

A physician, shown to be an expert, may give in evidence his opinion whether a still-born child could have been born alive if he had received medical assistance in time. *Telegraph Co. v. Cooper*, 71 T. 508.

Under the plea of *non est factum*, when the evidence offered by plaintiff was to the effect that the body of the instrument, the signature to which was alleged to have been forged, was written by the pretended obligor, the defendant may show by the testimony of an expert that the instrument was in the handwriting of the party to be benefited thereby.

The defendant may also, under like circumstances, show by the testimony of experts, by a comparison between the handwriting of the instrument and that of papers introduced, which were admitted to have been written by the pretended obligor, that they were in a different handwriting. *Wagoner v. Ruply*, 69 T. 700.

(173.) The fact being admitted in a suit for damages on account of the negligence of the employé of a corporation, that he was legally in its employ soon after the injury complained of, but controverted as to whether he was employed at the time the injury was inflicted, evidence of the "general impression" of the employés that such employé was employed on the date of the injury, is not admissible. It would be competent to show by the recollection of witnesses the date when the employé began to act as such; from that date the employer would be liable for his acts of negligence, if his assumption to act as employé was with the knowledge and consent of such employer. *Railway v. Douglass*, 69 T. 694.

The opinion of a witness as to questions of time, quantity, number, distance and the like, when it is shown that he was in position, and had the means of forming an intelligent estimate, is sometimes admissible as the best evidence that can be obtained. *Railway v. Brousard*, 69 T. 617.

When it is material to the issue to ascertain the fitness of a railway engineer for the performance of his duties, and it was shown that a witness had sworn prior to the trial that he knew nothing about the competency of the engineer, and who only knew him the day before his death, it was error to permit the deposition of the witness to be read as to his opinion of the competency of the engineer. *Railway Company v. Scott*, 68 T. 694.

It is error to permit a witness to testify that he never owned title to land, when the title is the matter in controversy. Title, or absence of title, is a conclusion of law, to be determined from facts. *Gilbert v. Odum*, 69 T. 670.

**RULE 37.**--*A party is estopped from denying a fact which he has directly and willfully, by his words or conduct, induced another to believe, and to act on the belief so as to alter his own previous condition, and who would be prejudiced if the admission of the fact was retracted.*

(174.) A broker is entitled to compensation when he procures a purchaser with whom his principal is satisfied, and who actually contracts for the property at a price satisfactory to the owner. See opinion of facts illustrating this rule. *Conkling v. Krakauer*, 70 T. 735.

When the purchaser of personal property, under an executory contract for its sale and delivery, inspected it before receiving, he is estopped, as to patent defects, from denying that it was of the character bargained for, and this though he may have received it under protest. *Parks v. O'Connor*, 70 T. 377.

(182.) An estoppel rests upon actual or constructive fraud. It follows that the action of a land owner in fencing and claiming to a fixed point on the line of his survey, will not estop him from claiming under his deed that the line be extended, when his action has not caused others to alter their position regarding the property; and the establishment of his claim in connection with acts done by him, would not operate as a fraud on any one. *Tucker v. Smith*, 68 T. 473.

(184.) Coker and wife regularly executed a deed defective in description, for their homestead, to Knight. It was intended as security for money advanced. Coker sold to Lee, after pointing out the corners, and put him in possession, and Knight, at Coker's request, made the deed to Lee. Lee remained in possession until his sale to Roberts. Coker and wife had never abandoned the land as homestead, and sued Roberts, who, at his purchase, was ignorant of the homestead character of the property. *Held*:

1. That Lee took no title as against the homestead, because the transfer from Knight, at the husband's request, did not conclude the wife, nor did the husband's pointing out the corners of the tract cure the defective description of the land in the deed.

2. Roberts, buying from Lee in possession, under legal title perfect on its face, without notice of the homestead rights of Coker and wife, and paying the purchase money, would be protected against the claim for homestead. *Coker v. Roberts*, 71 T. 598.

(185.) If one accepts and records a deed, which was taken in settlement of accounts by one who assumed to act as his agent, after being notified of the settlement, he is thereby estopped from denying the authority of the agent, and is bound by the terms of the settlement made. *Prather v. Wilkins*, 68 T. 187.

(188.) The rule that a tenant will not be allowed to controvert his landlord's title extends to the tenant holding over. He may buy in the landlord's title, or one consistent with it, and defend under such purchase. The purchase of an outstanding title by a tenant may be repudiated by the landlord, in which event the tenant may assert the title so purchased, subject to the obligations he is under by the terms of his lease. [Taylor on Landlord and Tenant, sec. 705.] *Moshan v. Meyers*, 1 U. C. 100.

There is no dispute but that tenants or their privies in blood or estate are, as a general rule, estopped from contesting the title of their landlord as long as they hold the possession originally derived from him. Most of the exceptions to this rule are stated in 4 *Walt's Actions and Defenses*, 259, as follows:

"The tenant may, however, show that the landlord's title has expired, or that some change has taken place in it since the lease; that he himself has purchased a title not inconsistent with his duty as tenant; or that he was induced to accept the lease or possession by fraud or mistake." *Casey v. Hanrick*, 69 T. 44.

A tenant induced to take land by mistake, fraud or misrepresentations on the part of the lessor, may dispute his title.

Possession by one claiming an equitable title to land is notice of the claim, and he is not estopped from asserting it by an acknowledgment of tenancy obtained by misrepresentations on the part of the lessor; such possession is also notice to all who, by their relations to the lessor as principal and agent, community in interest or common design against the tenant, are chargeable with the effect of notice to the lessor. *Whitset v. Miller*, 1 U. C. 203.

To relieve the tenant from an estoppel which prevents him from denying the title under which he first entered upon the property, he should give up the ad-

vantage he derived from the tenancy by being let into possession. *Juneman v. Franklin*, 67 T. 411.

A tenant is chargeable with notice of all equities of his lessor in the property leased. He cannot repudiate his tenancy and become an innocent purchaser in good faith, as against his lessor, of property held by him as tenant. *Smith v. Redden*, 1 U. C. 380.

(189.) In a suit by children for damages to real estate, the separate property of their deceased mother, the father joined as next friend of one of the heirs; *held*, that he would be estopped from thereafter asserting claim for damages for the same act to his life estate in one-third of the land. *Lee v. Turner*, 71 T. 264.

In a suit on the official bond of a tax collector it is unnecessary for the plaintiff to prove the election of the defendant as tax collector, when the bond, which is the basis of the action, recites that he is the tax collector; the signatures of the collector, and of the sureties to the bond, estop them from denying his official character. *King v. Governor Ireland*, 68 T. 682.

(191.) A mutual mistake in the calls of a deed conveying land in excess of that bargained for, cannot be corrected at the suit of the vendor, when, after the discovery of the mistake, he has received payment of the purchase money for the land thus conveyed, and yielded possession thereof to the vendee. *Wittbecker v. Walters*, 69 T. 470.

(191a.) A contract and bond executed by contractors and their sureties with the commissioners of a county, some of the provisions of which were not in accord with a former order of the county commissioners' court which referred to the contract, cannot be avoided by the contractor and sureties who thus assented to a disregard of the prior order. *Milliken v. Callahan Co.*, 69 T. 205.

It is the duty of a depositor in a bank to know whether the account is correct or not, and promptly to report a forgery when detected. Should he negligently fail to make the examination and consequent discovery (when he could have discovered it), it is as if he had expressly admitted the genuineness of the checks, and he will not be permitted to deny the fact, provided the bank be prejudiced by his failure. It has been held by this court that when one party has been prevented or induced by the conduct and representations of another from taking prompt action for the collection of his debt, that this is such a change in his position for the worse as to meet the requirement of the law in order to create an estoppel. [*Schwarz v. National Bank*, 67 T. 217.] *Weinstein v. Bank*, 69 T. 38.

Money paid under a mistake of law with respect to a liability to make payment, but with full knowledge of all the facts on which the claim for payment is based, and on which the right to resist payment depends, cannot ordinarily be recovered back. *Gilliam v. Alford*, 69 T. 267.

(192.) In a suit to recover personal property purchased at execution sale under a judgment against the defendant, it is competent for the defendant to prove that the property belonged to a third person, and not to himself, when sold. Even if the defendant had declared himself the owner before sale, it would not estop him from showing the contrary, or pass to the purchaser the title of a third person who was not a party to such declarations. *Hill v. Newman*, 67 T. 265.

The declarations of a ward made to his guardian before attaining his majority that he would soon be twenty-one years old, and that he would then on final settlement allow the guardian credit for goods purchased of the guardian, is not binding on the ward after he attains his majority, either as a contract or by way of estoppel. *Jones v. Parker*, 67 T. 76.

(193.) A declaration, though untrue, can never operate as an estoppel if the person to whom it is made is not induced by it to do something which he was not under legal obligation to do. *Railway v. Gordon*, 70 T. 80.

(198.) If a doubt exists between parties as to their rights, and both have the same knowledge, or means of knowledge, relating to facts involving such rights, and there is no fraud, misrepresentation or concealment, a compromise voluntarily made between them will be enforced, although the final issue may be different to that anticipated, and although the disposition made by the parties in their agreement may not be such as the court would have decreed had the controversy been brought before it for decision. See opinion for a settlement between a surviving wife and the purchaser of an interest in a benefit certificate issued by the American Legion of Honor, illustrating this rule. *Gilliam v. Alford*, 69 T. 267. See Civil Statutes, Art. 2245 (170).

**ART. 2247. Husband or wife not disqualified, when.**

(1.) Husband and wife are not incompetent to testify for themselves and in the protection of their own interests. *Cairrell v. Higgs*, 1 U. C. 56.

**ART. 2248. Evidence of a party in suits against executors, etc., incompetent, when.**

(8.) Defendant, Wills, was permitted to testify, over the objections of plaintiff, as to facts tending to show that the land in controversy was his homestead in April, 1880, which was the time of the execution of the mortgage from him to plaintiff's testator. Plaintiff excepted to the ruling of the court on the ground that the suit was being prosecuted by an executor, and that, therefore, defendant was incompetent to testify under the statute. The language of our statute, in so far as it bears upon the question before us, is: "In actions by or against executors \* \* \* neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator." \* \* \* The question is: Was the defendant permitted to testify as to any transaction with plaintiff's testator? He testified neither to the loan of the money set up in the petition, nor its payment; nor to the deed executed by himself, nor the defeasance executed by the testator. His testimony was as to his purchase of the land; the intention in purchasing it; his sale of his former homestead, prior to the transaction in question in this suit; his removal of his household goods upon the place, and his occupancy of one of the houses upon it, when the deed was executed; and the absence of his wife and children in Indiana, and the reason of their absence. While the tendency of this testimony is to materially affect the validity of the transaction between the witness and plaintiff's testator, it is not testimony "as to" the transaction itself. *Moore v. Wills and Wife*, 69 T. 109.

**ART. 2250. Printed statute books, evidence.**

(1.) When an old law is superseded by a new one, whose provisions are vague and indefinite, the former law may be resorted to for purposes of construction. *Steadman v. Bank*, 69 T. 50.

(2.) The certificate of the secretary of state of another state attached to what purports to be a copy of a legislative act of his state, and authenticated by the great seal of state, which declares that the copy is "an exact transcript of an act of the general assembly, 'etc.," as the same appears of record on page 180 of the official published acts of that year, now in my office," was properly admitted in evidence to prove the legislative act. *Harvey v. Cummings*, 68 T. 599.

(5.) A foreign law must be proved as a fact, and in the absence of proof the presumption is that it is the same as in Texas. *Eranks v. Hancock*, 1 U. C. 554.

**ART. 2252. Copies of public records, evidence.**

(1.) A decree of divorce pronounced in the court of another state was held to have been properly proved by a witness who examined the records of the court and found there a decree, which he examined, and the examined copy of which he testified to.

(2.) A patent regularly issued is evidence of the state parting with her title to the land, and the transfer of it to the patentee.

The record of the patent in the land office is a record from which copies are subsequently given. These copies are evidence of the original grant by the state.

A copy certified as of the patent *as originally issued* could properly be given by the commissioners of the land office, whenever demanded or necessary to the rights of parties interested.

Such indorsement of itself will not affect the validity of the patent, unless done by competent authority. *Stevens v. Geiser*, 71 T. 140.

(4.) One who sues for a divided interest in surveys containing a designated quantity of land, which interest is alleged in the petition to have been set aside to him by commissioners appointed in partition proceedings, may read in evidence the decree of partition as a muniment of title, without serving the defendant with notice before trial of his intention to offer it in evidence. *Harvey v. Edens*, 69 T. 420.

**ART. 2253. Copies of records and certificates of facts admissible in evidence.**

(4.) The certificate of the comptroller from the records of his office are admissible in evidence where the area of adjoining lots may become material to aid in determining the division line between them. *Edwards v. Smith*, 71 T. 156.



(7.) The copy of a testimonio of the *visita general*, which was certified to by the mayor of Laredo under the seal of the corporation, and deposited in the general land office by J. L. Haynes, who was appointed under the act of April 24th, 1871, is such a paper as the commissioner of the general land office may properly certify to, and under Art. 2253 (Revised Statutes) is admissible in evidence in all cases in which the original protocol of such *visita general* would be admitted. That copy, so far as preserved, was authenticated, as such instruments were required to be, by the laws then in force; it had all the force and was entitled, under the facts referred to in this case, to all the faith given to authentic instruments.

The Legislature which required the transcripts of the archives on the Rio Grande towns mentioned in the act of 1871, having been passed with a knowledge that the protocol of the *visita general*, under the laws in force at the time, was deposited in the City of Mexico or at Guadalajara, and that a copy only was left to serve as an archive in the local municipality, it must be presumed that it was the intention to make such transcripts evidence of every fact that could be shown by the papers from which they were copied.

After the lapse of a hundred years, the *visita general* found archived at Laredo, under which rights had been acquired and recognized continually, cannot be invalidated as evidence, because of the fact that a few of the original leaves are missing; the presumption will prevail that they were executed with the same regard to the laws in force, that is observed in that portion which is preserved. *Railway v. Jarvis*, 69 T. 527.

(6.) The plaintiff offered in evidence the translated copy of the title to Rafael De Aguirre to the land in controversy. On the first leaf or page of said certified copy there appear the following words and figures:

"Title in favor of Rafael De Aguirre for 11 leagues of land, 10 of which are situated on San Jani C. and Williamson's creeks, and one league on Cow bayou, west side of Brazos, issued by T. Lessessier, alcalde of San Felipe. October 22d. 1829." Written in pencil: "This is the genuine title to Rafael De Aguirre—the name Perfecto Valdez inserted through mistake. J. P. B." Also in pencil. "See Mr. Borden's letters, file 3636. Refer to title to Rafael De Aguirre on west of Brazos, Note 1." The above is a true copy of the memoranda attached to the title, which was objected to on the ground that the page or leaf was no part of the title issued by the officers of the government, but a memoranda made by some person unknown, at an indefinite time, expressing the opinion or conclusion of such person upon the issue now being litigated—that is, as to whether the Aguirre title is genuine, and because the commissioner could not validate the title, if a forgery, by an order or ruling, and said evidence was calculated to mislead the jury—which objections were overruled, and the point saved, and is now assigned as error. *Gaither v. Hanrick*, 69 T. 92.

#### ART. 2257. Recorded instruments, evidence when.

(6.) Six months before a certified copy of a deed was offered in evidence it was filed with the petition, but was not referred to therein. The petition alleged that the original was in the custody of the defendant, and gave him notice to produce it, or secondary evidence of its contents would be offered on the trial. The defendant was its proper custodian. *Held*, that it was not necessary that the plaintiff should make affidavit that he could not procure the deed; the copy was admissible in evidence, and only admissible under article 2257, Revised Statutes. *Pennington v. Schwartz*, 70 T. 211.

Certified copy of deed is admissible upon affidavit as required in this article; proof of search, etc., for original not needed. *Nye v. Gribble*, 70 T. 458.

A certified copy of a deed is not admissible in evidence on mere proof that the party offering it had caused the original deed to be attached to a commission to take testimony, and sent to the clerk of another county, who had not returned the same, although requested to do so by letters written by the party and by others. Such evidence does not establish the fact that the deed could not have been procured by the exercise of reasonable diligence. *Crafts v. Daugherty*, 69 T. 477.

(11.) When a deed is offered in evidence, the effect of an affidavit of forgery is to put the party claiming under it upon proof of its due execution, which must be by the production of the subscribing witnesses, or one of them, if living, or if dead, incompetent to testify, or cannot be procured, then by proof of their handwriting. Proof of handwriting may be made by one who has seen the party

write, or, having received letters from him purporting to be in his handwriting, has afterwards communicated with him personally respecting them. [1 Greenleaf, 762-769.]

The husband is incompetent to be a subscribing witness to a deed in favor of his wife.

Where one of the subscribing witnesses to a deed is incompetent to be a subscribing witness, and incompetent to testify, its execution may be established by proof of the handwriting of the other subscribing witness, he being dead.

The requirements of the law concerning the proof of a deed for registration have no application or reference to the proof necessary upon offering it in evidence on the trial of a cause. *Cairrell v. Higgs*, 1 U. C. 56.

A copy of a deed purporting on its face to be the act of the corporation, certified to by the county clerk, and which recites that it was executed by the officers of the company under its corporate seal, is admissible in evidence, though a scroll by way of seal is placed in the certified copy where the corporate seal should have been attached in the original. It being a violation of the duty of the recording officer to take the acknowledgment of the officers of the corporation, unless the instrument was sealed with the corporate seal, the presumption must obtain that it was thus sealed, after the lapse of twenty-five years from its registration. *Catlett et al. v. Starr*, 70 T. 485.

**ART. 2266. A verified account, evidence when.**

(5.) Though a tradesman's books of original entry of charges against a customer are admissible in evidence, they are only admissible after it is shown: 1, that they contain a correct record of his business as it transpires, and that the original entries therein were made contemporaneously with the transaction of the business which the entries evidence; 2, the entries must relate to the business for which the books are kept, and not to matters disconnected therewith; 3, they must show with reasonable certainty what article of trade was made the basis of the charge; 4, the book must be regular, and the entries free from suspicion of alteration; 5, if they be kept by the party offering them, he should make oath to their correctness, and should offer evidence sustaining his probity and fair dealing in his accounts with others.

See this case for facts under which it was held that an examined copy of entries in a lost book of original entries, kept by a saloon keeper, was not admissible in evidence in a proceeding to enforce collection for "drinks," "games," "balances," etc., against the estate of a dead customer. *Baldrige v. Penland*, 68 T. 441.

## TITLE 39.—EXECUTION.

## ART.

2267. On judgment of district and county court. *Annotated.*

2267a. See Civil Statutes.

2268. Execution before adjournment, when. *Annotated.*

2269 to 2277. See Civil Statutes.

2278. County to which execution for money shall issue. *Annotated.*

2279 to 2286. See Civil Statutes.

2287. Levy of execution. *Annotated.*

2288. Failure of defendant to designate property. *Annotated.*

## ART.

2289 to 2308. See Civil Statutes.

2309. Notice of sale of real estate. *Annotated.*

2309a to 2315. See Civil Statutes.

2316. Conveyance to purchaser. *Annotated.*

2316a, 2317. See Civil Statutes.

2318. Purchaser deemed innocent. *Annotated.*

2319 to 2334. See Civil Statutes.

## ART. 2267. On judgment of district and county court.

(1.) The payment of a judgment, by a stranger to it, will operate as an extinguishment of it, unless there is some understanding that it is to be continued in force for the benefit of the person making the payment.

After such payment the judgment will not support an execution—and a purchaser at an execution sale under such satisfied judgment passes no title to land so sold. *Terry v. O'Neal & Son*, 71 T. 592.

## ART. 2268. Execution before adjournment.

(1.) The fact that the court rendering a final judgment has not adjourned at the time of the issuance of execution on such judgment, is immaterial if twenty days have elapsed between the date of judgment and the date of the issuance of the writ. *Bumpass v. Morrison*, 70 T. 757.

## ART. 2278. County to which execution for money shall issue.

(1.) The issuance of an execution first to a county other than that in which judgment is rendered, is an irregularity of which no one, not having an interest in the property levied upon, can complain. *Railway Co. v. Morris*, 67 T. 692.

## ART. 2287. Levy of execution.

(1.) Pending an injunction suit to restrain the sale of property under an execution, the defendant in the execution, who was the plaintiff in the injunction suit, filed a motion to quash the levy under the execution, on the ground that no valid levy had been made, that the levy had been made upon property of the value of \$20,000 to satisfy a debt of \$500 or \$600, that the property was exempt from execution, etc. *Held*, that upon proof of the facts alleged the levy was properly vacated. *Schiffer v. Fort*, 1 U. C. 198.

## ART. 2288. Failure of defendant to designate property.

(1.) Money in the hands of a sheriff and belonging to a judgment debtor against whom the sheriff holds an execution, may be applied to the payment of such execution by the sheriff, although the money had been made by the sheriff on execution. *Mann v. Kelsey*, 71 T. 609.

## ART. 2309. Notice of sale of real estate.

(1.) When notice of a judicial sale has not been properly given, if objection be made by defendant in execution without unnecessary delay, the sale may be set aside; if objection be not made in reasonable time, it will be considered as waived.

In a collateral proceeding it is not essential to the validity of an execution sale that there should have been an advertisement of the property; though if the irregularity is brought about by the fraudulent collusion of the purchaser, and the property sells for a grossly inadequate price, the sale may be avoided as to such vendee and those claiming under him with notice.

Construing articles 2309 and 2319, Revised Statutes, *held*, that it was not the intention of the Legislature that sales of property under execution should be void on account of mere irregularities in advertising or in failing to advertise such property, but it was intended that the injured party should seek redress from the

officer, and this in consideration of the public policy that execution sales should be sustained. *Morris v. Hastings*, 70 T. 26.

(4.) In a sheriff's deed, otherwise valid, reference is made to other well known deeds for description; the deeds so referred to are produced, and describe the land; *held*, that such deed will convey title to the land so identified. *Wright v. Lassiter*. 70 T. 640.

**ART. 2316. Conveyance to purchaser.**

(7.) The recitals in a sheriff's deed that a particular interest in land had been levied on and sold, will not conclude the purchaser at the sheriff's sale from showing, by the process under which the sale was made and the decree of foreclosure, that a sale of an interest other than that recited in the deed was actually offered for sale and sold, and that the purchaser became entitled to what he actually bought, although additional to that described in the deed as having been levied on.

The recitals in a sheriff's deed are evidence of what was sold, but they are not conclusive. The sheriff's sale conveys to the purchaser whatever of title was subject to the sale as indicated in the decree of foreclosure, and in the order of sale. It is a doctrine as old as our jurisprudence, that a purchaser *pendente lite* takes only such title as his vendor could give; takes subject to the result of the pending legal proceedings. [*Briscoe v. Bronaugh*, 1 T. 333; *Lee v. Salinas*, 15 T. 497; *Tuttle v. Turner*, 28 T. 773; *Baird v. Trice*, 51 T. 555.] *Rippeto v. Dwyer*, 1 U. C. 498.

If the recitals on the return of an execution correspond with those contained in the sheriff's deed, as to the extent of the interest in land levied on and sold, parol evidence is not admissible in a collateral proceeding to correct or vary such recitals.

Under such circumstances the party whose rights are prejudiced, must seek relief in a direct proceeding brought to obtain it. [This case distinguished from *Holmes v. Buckner*, 67 T. 107.] *Flaniken et al. v. Neal et al.*, 67 T. 629.

In a suit for the recovery of land claimed by virtue of a purchase at sheriff's sale and sheriff's deed, where the sheriff's return is not in accordance with the deed, parol evidence is admissible to explain and correct the sheriff's return on the execution. *Holmes v. Buckner*, 67 T. 107.

The lands described in the petition in this suit were in a suit brought against the heirs by one Freeman for specific performance and partition allotted to the heirs, and an execution was issued against them for the costs to the sheriff of Bell county.

This execution was levied upon the one thousand two hundred and eighty acre survey, and the two hundred and twelve acres of that survey now in controversy were sold by the sheriff under that execution to Saunders and Allen. The sheriff's return on the execution recites that he sold the interest of John F. M. Lemon in said two hundred and twelve acres, who was one of the heirs and a defendant in the execution. The sheriff's deed purports only to convey the interest of that heir in the land. Saunders and Allen subsequently sold to one Berry and others by a warranty deed for six hundred and thirty-six dollars, one half in cash and one half on a credit, as evidenced by a promissory note executed to them by their vendees. They transferred this note to one Denny, who brought suit thereon and obtained a judgment foreclosing the vendor's lien on the land. The land was sold under this judgment, and Denny became the purchaser. He subsequently conveyed it to appellants by quit-claim deed. They set up these facts in their answer, and asked that Saunders and Allen, as warrantors, be made parties, and that in the event judgment be had against them that they have judgment against Saunders and Allen upon their warranty.

The appellants having pleaded that the sheriff at the sale under the execution from Travis county in fact sold the interests of all the defendants therein in the two hundred and twelve acres of land, that the recitals in the return were a mistake, and made by inadvertence, and that the deed conveying only the interest of one of said defendants was also erroneous, and was so made through inadvertence—offered to prove these facts by the sheriff and other witnesses. Upon objection by the plaintiffs the testimony was excluded, and appellants excepted.

We think the court did not err in its ruling. It is settled law in this state that a sheriff's deed is not necessary to pass title at a sheriff's sale of real estate. A valid judgment, execution and sale are sufficient for this purpose. But we are

clearly of opinion that if a deed be made, and the recitals contained in it correspond with those in the return, they cannot be varied by parol evidence in a collateral proceeding after such a lapse of time as has occurred in this case. The facts before us differ materially from those of the case of *Holmes v. Buckner*, 67 T. 107. There the deed and the return varied as to the time of the sale by the sheriff under the execution, and parol evidence was held admissible to show that the deed showed the correct date. Here there is no discrepancy between the return on the execution and the officer's conveyance, and it is sought in a collateral proceeding to prove *aliunde* that the interests of all the defendants in the execution in the land in controversy were sold, instead of that one of them, as shown by both the sheriff's return and his deed. In such a case the return should be deemed conclusive until set aside by a direct proceeding brought for the purpose of amending it. [*McMicken v. Commonwealth*, 58 Penn. State, 213; *Burrows v. Rubber Company*, 13 R. I. 78; *Swift v. Cobb*, 10 Vt. 282; *Campbell v. Webster*, 15 Gray, 28; *Whitaker v. Sumner*, 7 Pick. 551; *Sykes v. Keating*, 118 Mass. 517; *Bamford v. Melvin*, 7 Me. 14.]

In *Ayres v. Duprey*, 27 T. 599, this court say: "As a general rule, in the absence of fraud or mistake, it certainly cannot be maintained that the return of the sheriff can be varied or contradicted by parol testimony." Also, in *King v. Russell*, 40 T. 124, it is said that the sheriff might be called to show that he was mistaken in saying, in his return, that the property levied upon was pointed out by the defendant in execution; but it being a case in which the validity of the sale by the officer was not called in question, it does not come under the rule we have stated. We are of opinion that if the facts were as claimed by appellants, the purchasers at the sheriff sale had a remedy to correct the mistake. But this should have been by a direct proceeding brought in the court from which the execution issued, for the purpose of correcting or amending the return, and to reform the deed. *Flaniken et al. v. Neal et al.*, 67 T. 629.

In an action of trespass to try title, the defendant only pleading not guilty, a sheriff's deed offered by defendant, without a judgment and execution to support it, was properly excluded. *Tudor v. Hodges*, 71 T. 392.

It has been repeatedly held that a sale under an execution issued under a dormant judgment is not void, but only voidable, and at the instance of the defendant in execution. [40 T. 158, *Bozgeess v. Howard*; 29 T. 225, *Hawley v. Bullock*; 20 T. 287, *Anderson v. Richardson*; 15 T. 209, *Hancock v. Meiz*; 13 T. 598, *Sydnor v. Roberts*. See, also, *Freeman on Executions*, secs. 29, 30.] Upon these authorities, the exclusion of the entries in the execution docket showing the issuance of executions and returns, and of the sheriff's deed, was error. *Maverick v. Flores*, 71 T. 110.

#### ART. 2318. Purchaser deemed innocent.

(1.) A purchaser at execution sale, who, being the owner of the judgment under which land is sold, credits his bid on the execution, takes the land charged with all the equities to which it is subject. Though the judgment debtor was the apparent owner when the debt was contracted and the judgment was rendered, such purchaser would acquire no title by his purchase as against a claimant in possession who had paid purchase money and made valuable improvements under a parol contract. The beneficiary in the trust had in this case taken possession, made improvements, had been in possession for ten years, and was in possession when the land was sold under execution, and when the credit for the debt on which the judgment was rendered was extended. *Barnett v. Vincent*, 69 T. 685.

Upon the sheriff executing a deed to the purchaser, it will be presumed that payment was made. Where the judgment creditor purchases, it is not necessary that the money be in fact paid to the sheriff. The credit upon the execution is a payment. *Blum v. Rogers*, 71 T. 669.

(8.) Though land conveyed to the husband during coverture is presumed to be community property, and the purchaser at execution sale under a valid judgment against him takes title, it is otherwise if the wife's separate property was given for the title. She then becomes the equitable owner, and notice of her rights given at such execution sale will defeat any right the purchaser would otherwise have acquired. *Harris et al. v. Seinsheimer*, 67 T. 356.

(9.) At the sale of property levied on under execution, the holder of a note purporting on its face to be for purchase money for the land offered for sale, announced, in the hearing of bidders present, that such a lien existed. In a suit

by the holder of the note to foreclose his lien upon the land sold, the burden of proof was upon him in asserting his equitable claim against the legal title of the purchaser at the execution sale. The levy of the execution being a lien upon the land, in the absence of anything indicating the existence of the purchase money lien, either on the face of the title papers or of record, or possession of property by tenant or otherwise, and it not being shown that the judgment creditor had actual notice of the purchase money lien at the time of the levy, the knowledge of the purchaser at the execution sale of the lien held by the plaintiff, will not prevent his taking a good title to the land under the sheriff's deed as against the lien of the note. [24 T. 355; 48 T. 469; 50 T. 315; *id.* 323; 23 T. 651; 45 T. 527; 46 T. 401; *id.* 416; 47 T. 170.] *McAfee v. Wheelis*, 1 U. C. 65.

(10.) A sheriff's sale made under execution issued on a dormant judgment is voidable, and as to the purchaser who is a stranger to the proceeding, it cannot be collaterally attacked. *Hill v. Newman*, 67 T. 265.

(11.) A sheriff's sale made in violation of an agreement between all the parties in interest that the sale should not take place unless all were present, and at which the land sold for an inadequate consideration, was set aside. *Ward v. Duer*, 70 T. 231.

One claiming under a fraudulent conveyance cannot procure a sale to be set aside for gross inadequacy of price, which is made under legal process to satisfy a judgment against his vendor, when the low price bid for the property was caused by the registration before the judicial sale of the fraudulent conveyance.

In order to set aside a sheriff's sale for gross inadequacy of consideration, a direct proceeding should be instituted for that purpose in the court from which the execution issued, and the plaintiff in execution, as well as the purchaser, should be made parties. *Miller v. Koertge*, 70 T. 162.

An execution sale of property which has been levied on by the sheriff in violation of law under the persuasion of one who became the purchaser thereof at such sale, for a grossly inadequate price, may, as to such purchaser, be avoided by the judgment debtor. *Stone v. Day*, 69 T. 13.

(13.) A purchaser at sheriff's sale, whose money, paid on the purchase, satisfied the judgment under which the sale was made, is entitled to be subrogated to the rights of the plaintiff in execution, if the sale should be held void. *Flaniken et al. v. Neal et al.*, 67 T. 629.

(19.) Money paid upon a judgment, afterwards reversed, may be recovered by the party who made the payment, if the payment was made to prevent the sale of the defendant's personal property under execution. It will not be considered voluntary, and the judgment, on reversal, will be treated as though it had never existed.

When the plaintiff has purchased at execution sale, and the judgment is afterwards reversed, the defendant may recover from him the property itself, or, if it has been alienated, its value. If, however, the purchase was made by a third party, his right and possession will not be disturbed, but the defendant must look to the plaintiff, who caused the seizure and sale, for reimbursement.

When such a sale is made, and the judgment authorizing it is reversed, the measure of defendant's damages is not what the property realized at forced sale, but its full value, and this though the property had been surrendered under a judgment which required the claimant to pay the demand or surrender the property. It was not necessary for the claimant to protest or give notice of appeal at or before the delivery of the property. *Cleveland v. Tufts*, 69 T. 580.

## TITLE 40.—EXEMPTIONS.

### CH. 1.—PROPERTY EXEMPT FROM FORCED SALE.

**ART.**  
**2335.** Property exempt from, to every family. *Annotated.*  
**2336.** "Homestead" defined. *Annotated.*

**ART.**  
 2337 to 2340. See Civil Statutes.  
 2341. Homestead exemption does not apply, when. *Annotated.*  
 2342. See Civil Statutes.

**ART. 2335. Property exempt from forced sale.**

(7.) The fact that the wife never has lived upon the place occupied and dedicated by the husband as a homestead, cannot render it less the homestead of the family. [Following *Henderson v. Ford*, 46 T. 628.] *Moore v. Wills and Wife*, 69 T. 109.

(10.) The statute exempting from forced sale "all household and kitchen furniture" embraces all necessary, convenient or ornamental articles with which a household is equipped, and may include a piano used for the instruction of children in music. The Legislature did not intend to limit the exemption to such articles as are mere necessities to a family.

The existing statute places no limit on the value of the household and kitchen furniture, which it declares shall be exempt from forced sale; former statutes did.

[*Farmer v. Billings*, 18 Wisconsin, 175, reviewed and distinguished.]

In determining the extent of statutory exemptions from forced sale, the plain duty of the courts is to enforce the legislative intention, as manifested by the letter and spirit of the law. Whether the exemptions extend too far must be determined by the Legislature.

Looking to the entire article giving the exemption, it is evident that the Legislature did not intend to limit the exemptions to such things as are necessities to the family. It exempts "the family library and all family portraits and pictures." This will embrace the entire collection of books belonging to the family, without reference as to whether they are such as convey information necessary in the ordinary affairs of life, or such as merely minister to the pleasure or amusement of the family or some of its members. It also exempts "one carriage or buggy;" vehicles convenient but not necessities in every family. In the case of *Farmer v. Billings* (18 Wis. 175), it was held that under the Statutes of Wisconsin, exempting property from execution, a piano was not exempt. The statute, it seems, exempted specific articles of household furniture, and then used the language: "and all other household furniture not herein enumerated, not exceeding two hundred dollars in value." *Alsop & Thompson v. Jordan*, 69 T. 300.

(15.) Cotton grown upon the homestead and unpicked is exempt from execution. After it has been picked the exemption ceases and it is subject to execution. *Coales v. Caldwell*, 71 T. 19.

(18.) A charge of court which by its terms limits the plaintiff's right to recover in a suit for damages to injuries which are serious, is error. Nominal damages, at least, may be recovered for every injury caused by the trespass of another, however slight may be the injury inflicted. When such damage results from the law, not only the officer making the seizure, but those in whose favor the seizure is made, and who ratify the officer's act, as well as those who direct it, are liable. If the illegal levy and seizure of the property is oppressive, and the conduct of the officer malicious toward the claimant and owner of the exempt property, exemplary damages may be recovered against not only the officer, but any other person who knowingly encouraged or directed the malicious act.

He who accepts benefit under an illegal levy upon the property of another, after knowledge of the illegal act, will be deemed to have ratified the same, and will be responsible equally with the officer for such damage as is the natural and proximate result of the illegal act. *Brown v. Bridges*, 70 T. 661.

**ART. 2336. Homestead defined.**

(1.) At the date of the levy of an execution on the land of plaintiff, he was a single man, had never been married, but was living in a house on said land,

occupying the same as a home, and had so resided more than five years before, said time. He had living with him a woman, with whom he had lived and cohabited for more than twelve years before the levy, and two illegitimate children of whom he was the father and said woman the mother; he and said woman and children lived together in all respects as husband and wife and children, except that he and said woman had never been married. It further appeared that part of the land was cultivated.

The court found that such an aggregation of persons did not constitute a family within the meaning of the law exempting the homestead from forced sale, and entered a judgment in favor of the defendant. The correctness of this conclusion is the sole question in the case, the tract of land containing less than two hundred acres.

It is very clear that a family, such as is contemplated by the Constitution and laws exempting the homestead from forced sale, cannot be made up with constituents consisting only of a man and a woman living together, as were the plaintiff and the woman with whom he was living. The law prohibits and makes penal such cohabitation as existed between them, and it never was intended that persons so associated, and living in plain violation of law, should be deemed a family, which it is the purpose of the homestead exemption to protect. To constitute a family, within the meaning of the law giving the homestead exemption, the persons who dwell together must not in the fact of so doing be violators of the law of the land.

If, however, the relationship between the plaintiff and the children, who lived with him, be such as to constitute these persons a family, then his homestead right must be recognized and enforced, notwithstanding the fact that his cohabitation with the woman was illegal; for the homestead right existing by reason of and for the protection of the family, of whomsoever composed, cannot be defeated by the fact that the head of the family permitted another person, with whom he unlawfully cohabited, to dwell on the land. *Lane v. Phillips*, 69 T. 240.

Under the law as it existed in 1863, title to land which was possessed and owned as a homestead vested absolutely in the widow of the deceased husband, he dying insolvent, freed from all claim by his heirs, or liability to pay debts against his estate. It was not liable for any community debts contracted by the husband during his life.

Even if by an agreement in partition between the surviving wife, whose husband died in 1863, and his children, the main estate could be held bound to pay community debts under a judgment afterwards rendered against the surviving widow for a community debt, which was made the basis of a subsequent judgment against her administrator, for payment in due course of administration as a charge upon all the community property remaining at the time of the husband's death, "as well as all the interest devised by him to her which may be subject to forced sale for the payment of debts," the homestead of the wife would not be bound. Such judgment would constitute a complete bar to the right of such creditors and their privies to subject the homestead to forced sale. If the debt on which the judgment was rendered was one for which the wife was personally liable, a judgment might have been rendered against her administrator, which would have subjected her former homestead to sale, she having died leaving no constituent of the family. *Watson v. Ramey*, 69 T. 319.

While the title of a vendee who has not paid for land in fact occupied by him as homestead is not good as against his vendor, still, as against all others his title is good, and the exemption as to them is recognized. *Lee v. Welborne*, 71 T. 500.

(4.) The principles which are decided in *Clements v. Lacy*, 51 T. 156, and in *Jenkins v. Volz*, 54 T. 639, to the effect that a tenant in common is entitled to a homestead estate in lands thus held, and that such estate is not confined to an undivided interest in the two hundred acres constituting the rural homestead, but may be an undivided interest of two hundred acres in the entire tract, re-affirmed.

Construing this article, *held*, that a tenant in common, who establishes and improves a homestead place on the common property, is entitled in partition to have allotted to him the portion of the land so improved, or so much of it as may be equal in value to his share of the entire tract, independent of the improvements.



When on a rural homestead improvements are made at the joint expense of two tenants in common, the homestead being occupied and claimed as such by only one of them, the occupant is entitled to his two hundred acres, embracing the homestead improvements, and his co-tenant would in partition be entitled to an allowance for the amount expended by him in the making such improvements. *Lewis v. Sellick et al.*, 69 T. 379.

(5.) A head of a family by living upon a tract of land of less than two hundred acres thereby sufficiently designates such tract as the homestead, even if other lands are owned by the head of the family. *Coates v. Caldwell*, 71 T. 19.

The head of a family residing on a tract of fifty acres of land, situated a mile distant from another tract of two hundred and forty-six acres, which also belongs to him, a part of which is in cultivation, may claim as homestead the land on which he resides, and as much of the other as will make up the two hundred acres exempted by law. That the two hundred and forty-six acre survey is held as tenant in common, does not prevent the homestead from being established upon it, subject, however, to the rights of the co-tenant. [*Clements v. Lacy*, 51 T. 150.] *Morgan v. Estate of Morgan*, 1 U. C. 400.

(13.) Property used by the head of the family for carrying on the business he pursues for the support of his family, is just as much a part of the urban homestead as the urban residence, and when the homestead character attaches, it continues until voluntarily abandoned. The residence is accorded the protection of the homestead laws because of being the place of the home of the family, and the business house is protected because of its occupation and use for the purpose of carrying on the business or calling of the head of the family. To be an abandonment that would subject such property to seizure and sale, there must be a voluntary leaving or quitting of the residence with a then present intent to occupy it no more as a home, and to subject the business property to such liability, there must be a voluntary closing of the business for which it was used by the head of the family in pursuit of his calling. [*Clift v. Kauffmann*, 60 T. 64; *Clint v. Upton*, 56 T. 320; *Griffith v. Maxey*, 58 T. 214.] Being the decedent's place of business at the time of his death, it is immaterial that the business was conducted in the name of another. The homestead claim is fully sustained by the evidence given upon the trial, and that there was a total failure to prove abandonment.

Conceding there was fraud on the part of decedent in resuming and conducting the business in the name of another, that could not be made to operate as an estoppel against the homestead claim of his widow and children. The property being homestead, and protected against creditors, could not be the subject of fraudulent dealing as to creditors. [*Blum v. Beard*, 64 T. 59.] *King v. Harter*, 70 T. 579.

The occupation of the business homestead of an insolvent by his assignee, to whom possession is delivered with the merchandise contained therein, will not, if possession for business purposes be resumed, as soon as the assignee discharges the trust by a disposition of the goods, work an abandonment of the homestead rights. If the owner resumes possession and occupies the place for the purpose of doing a commission business, but fails to get custom, the fact that he is unable to induce others to patronize him will not work an abandonment of his claim to the property as a business homestead. If the apparent effort to transact business was a sham resorted to for the purpose of shielding the property, the homestead right would be lost. The fact that he had not obtained license to do business would be immaterial, if the business attempted was legitimate. *Gassoway v. White*, 70 T. 475.

The homestead right when fixed is an estate in the land. The creditor has no right in it nor to it as a security.

The owner of a resident homestead and a place of business may properly enlarge the building occupied by him in his business; such enlargement is exempt from forced sale.

The erection of a building adjoining a business house for the purpose of being leased to tenants is a designation of such addition to the other uses inconsistent with its exemption as the place of business.

A merchant falling in business has a reasonable time for settling up his old and to engage in new business, during which interval the exemption of the place of business is not lost, nor would a change in the business affect the exemption.

The law does not enforce upon the failing debtor any degree of success in his new enterprise if it be a *bona fide* business conducted at the former place of business, as a condition to its protection.

The use determines the place of business as also the dedication to other purposes. [66 T. 1; 57 T. 674; 59 T. 39; 42 T. 201.]

That a homestead exceeded the prescribed value does not prevent the premises becoming a homestead, nor subject the whole to sale.

In absence of pleadings raising the issue, the right of a creditor to any excess would not be determined. *Hargadene, McKittrick & Co. v. Whitfield*, 71 T. 482.

(29.) The wife and minor children of a man who has left the state and desires that they follow him, retained the protection of the homestead exemption upon the residence while they remained upon it, without regard to the wishes and purposes of the husband living out of the state.

A wife with whom the husband leaves his minor children on leaving the state may remain upon that homestead. Her occupancy of the homestead secures exemption; nor is the exemption lost by the desire and request by the husband that the wife should join him without the state; nor is it lost by the wife attempting to sell the same.

As the creditor has no right to the homestead as a fund from which to make his debt, there would be no fraud in the wife and family remaining upon their homestead until it could be sold, although the sale should be proposed as a means of defraying the expenses of joining the husband and father without the state. *McDannell v. Ragsdale*, 71 T. 23.

When a wife removes her domicile from this to another state she relinquishes any right of homestead which she might have retained had she continued an inhabitant of Texas.

It is immaterial what business may engage the attention of husband and wife who once establish their home beyond the limits of Texas; the nature of their business can have no weight in destroying the effect of the abandonment already accomplished. *Perry v. Scott*, 68 T. 208.

In a suit involving the homestead and the question of its abandonment, an instruction to the jury that, "if it was the fixed intention of the husband to abandon his homestead at the date of the levy of the attachment, it would not be necessary to prove that such was the intention of his wife also, to entitle the plaintiff to recover," was erroneous. [*Gouhenant v. Cockrell*, 20 T. 97; *Woolfolk v. Ricketts*, 48 T. 37; *Cross v. Everts*, 28 T. 533.]

On the question of abandonment of the homestead, refusal of the court to instruct the jury, when asked, that "though the husband and wife left the premises with the intention of abandonment, if they could sell, that that would not necessarily constitute an abandonment which would forfeit their right of exemption. It must be undeniably clear, and beyond all reasonable ground of dispute, that there has been a total abandonment with intention not to return and claim the exemption, in order to render the property liable for his debts," was error. [*Shepherd v. Cassiday*, 20 T. 29.] *Cox v. Harvey*, 1 U. C. 268.

The homestead rights of a husband and wife are lost by a voluntary abandonment of the homestead. Not only can the husband bind his children by such voluntary abandonment, but the homestead rights of the wife also are lost by her voluntarily leaving the home and accompanying the husband when he abandons it.

A husband and wife left their home in Texas, and after removing to another state, acquired a home there. After seven years the husband, during a temporary visit to Texas, sold the Texas home. Afterward the husband and wife returned to Texas, and, after living in a rented home, occupied the Texas homestead as tenants of another whose claim of title was in opposition to their claim of homestead rights. The wife left the Texas home unwillingly, and when in another state frequently expressed her intention to return to it, though this fact was unknown to the purchaser from the husband, *held*:

1. The declarations of the wife of an intention to return to her home could not outweigh the evidence of abandonment furnished by the acts and conduct of herself and husband during so long a period of time.

2. It was too late to repudiate the tenancy and assert homestead rights against their landlord's claim of title.

3. The homestead right was abandoned. *Reece v. Renfro*, 68 T. 192.

(33.) Articles 2343, 2344, 2345 relate to rural homesteads, providing for designating the homestead out of a tract of more than two hundred acres upon which the parties reside. It cannot apply to an urban homestead. A certificate of privy acknowledgment by a wife to such description of a town lot as homestead, not then or at any time occupied as the homestead, is not competent evidence for any purpose.

Husband and wife residing upon rented property in a village, and her homestead, the separate property of the wife, being temporarily leased, money was loaned to the husband upon certain representations, among others, that no claim was made to the country homestead. The agent of the company making the loan, testifying to having acted upon the representations of the wife, *held*, that the question of estoppel should have been submitted to the jury.

[28 T. 416, 730, followed in defining estoppel.]

As by the Constitution (Art. 16, Sec. 50) all liens upon homesteads are forbidden (save for purchase money and for improvements made thereon) the lien holder cannot rely upon the privy acknowledgment to give validity to such mortgage against the wife. Such mortgage cannot directly or by its recitals affect the homestead. *Mortgage Co. v. Norton*, 71 T. 683.

(34.) Whether property claimed as a homestead is exempt from forced sale must depend on the facts existing which would tend to make it a homestead at the time of the levy of execution. The former occupancy of other property as a home, which may be still owned by husband and wife, becomes immaterial, if at the time of the levy the property seized under execution was actually occupied and used as the home residence. *Ingle et al. v. Lea et al.*, 70 T. 609.

(35.) When contiguous lots of ground in a city are used for homestead purposes, by a family whose home residence is located on one of them, a temporary renting of the other lot on which also there is a dwelling house, will not divest it of the protection of the homestead exemption from forced sale, even though an intention existed in the mind of the owners to sell it, provided it was also the intention of the owners to continue the use of it for homestead purposes, if they could not sell it at a proper price. *Newton v. Calhoun and Wife*, 68 T. 451.

The holder of a mortgage has a right to release, in exchange for the homestead of the mortgagor, his lien on property covered by his mortgage, and will take, as against a judgment creditor of the mortgagor, a perfect title to the homestead. *Willis & Bro. v. Kirbie*, 1 U. C. 304.

#### ART. 2341. Homestead exemption does not apply, when.

(1.) The defendant, Skaggs, exchanged an interest in a mill for a tract of land in Johnson county, and, because it was rented out for that year, took a bond for title. Before occupying the land he purchased of Mulkey, on a credit, a half interest in a mill at Fort Worth, for \$1,600, assigning as additional security the title bond for the Johnson county land, and afterwards caused a deed to be made to Mulkey therefor. Failing to pay for the mill property, his interest in it was sold under foreclosure proceedings, leaving a large portion of the debt unpaid. Skaggs separated from his wife, and she, after a time, moved on the Johnson county land. Afterwards the husband returned to his family, and they were living on the land when Mulkey brought suit for it. The land never having been occupied as a homestead before the title bond to it had been assigned and used as a credit in making the purchase of the Fort Worth mill property, the claim of Mulkey was superior to any homestead rights of Skaggs or his family, and the judgment of the court holding the deed to Mulkey a mortgage for the balance due on the mill, and ordering a sale of the land to satisfy it, was not erroneous. [*Baird v. Trice*, 51 T. 555; *Thompson on Homestead*, Secs. 244, 245, 255.] *Skaggs v. Mulkey*, 1 U. C. 489.

(15.) As to whether one claiming a lien on a homestead, secured by a mortgage executed by the husband, and who pays the amount due to the state from the debtor, and receives in the debtor's name the patent to the land, is thereby subrogated to the rights of the state, and entitled to enforce a lien on the land for his reimbursement, *quære*. *Moore v. Wills and Wife*, 69 T. 109.

A purchaser of university land, or his vendee, who has not perfected his title thereto, by payment to the state of all the purchase money, may, nevertheless, as against creditors, assert his homestead right in the land. *McShan v. Meyers*, 1 U. C. 100.

T. 41 & T. 42, CHS. 1-3.] FEES OF OFFICE.

Arts. 2396, 2403.

## CH. 2.—EXCESS OF HOMESTEAD, ETC., HOW SET APART AND SUBJECTED TO EXECUTION.

ARTS. 2343 to 2367. See Civil Statutes.

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## TITLE 41.—FACTORS AND COMMISSION MERCHANTS.

ARTS. 2368 to 2371. See Civil Statutes.

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## TITLE 42.—FEES OF OFFICE.

### CH. 1.—OF CERTAIN STATE OFFICERS.

ARTS. 2372 to 2379. See Civil Statutes.

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### CH. 2.—CLERKS OF THE SUPREME COURT AND COURT OF APPEALS.

ARTS. 2380 to 2382. See Civil Statutes.

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### CH. 3.—COUNTY OFFICERS.

ART.

2383 to 2395. See Civil Statutes.

2396. Sheriff's fees. *Annotated.*

2397 to 2402. See Civil Statutes.

ART.

2403. County treasurers' commissions.

*Annotated.*

2404 to 2409. See Civil Statutes.

ART. 2396. Sheriff shall receive the following fees:

(1.) A sheriff, charging for service of process, can only rightfully charge for the distance actually traveled in any case, but he is entitled to charge the amount specified in the statute for each writ, though he may serve a number in making one trip. When two or more persons are mentioned in the same writ, he can charge for but one mileage. The fact that the sheriff, in executing process may go in person a portion of the way towards the witness he is required to summon, and, before reaching him, may deliver the process to a deputy, by whom it is served and returned by mail, will not affect the right of the sheriff to charge mileage for his return trip. *Railway v. Dawson*, 69 T. 519.

ART. 2403. Commissions of county treasurer.

(1.) When the commissioners' court of a county fail to fix, under the limitations of the statute, the amount which the county treasurer shall be paid for receiving and disbursing county money, and authorize another person to perform that function of his office, their act must be held as equivalent to an implied agreement on the part of the county that the treasurer shall have the maximum of two and one-half per cent. for receiving, and two and one-half per cent. for disbursing county funds. This held in a case in which it was shown that the county court had for more than ten years before the election of the treasurer, from whose control they diverted the county funds, allowed the maximum rate permitted by law for receiving and disbursing money. *Bastrop County v. Hearn*, 70 T. 563.

## CH. 4.—GENERAL PROVISIONS.

## ART.

2410 to 2426. See Civil Statutes.

2427. Each party liable for his own costs. *Annotated.*

## ART.

2428 to 2430a. See Civil Statutes.

## ART. 2427. Each party liable for his own costs.

(1.) In a suit brought against minors who owned no property from which costs could be collected, and for whose defense a guardian *ad litem* had been appointed, *held*:

1. That the costs incurred as compensation for the services of the guardian *ad litem* was the result of the suit brought by the plaintiff, and after the return of *nulla bona* on an execution against the minors, an execution to collect it could properly issue against the plaintiff.

2. The plaintiff would not be liable for the costs due the clerk or sheriff, or for witness fees incident to the minors' defense.

3. In the absence of a statute, equity would in some cases allow compensation to a guardian *ad litem*, to be taxed as costs, and charged to the successful party in the cause. *Ashe v. Young*, 68 T. 123.

## TITLE 43.—FENCES.

ART.

2431. Sufficient fence defined. *Annotated.*

ART.

2432 to 2435a. See Civil Statutes.  
2435b. Partition fences. *Amendment.*

## ART. 2431. Sufficient fence defined.

(1.) At common law the right of pasturage on uninclosed land vests in the owner of the land, and the right of common in the absence of his consent did not exist. The owner of cattle grazing upon the lands of another was responsible for all damage done by them whether the land was inclosed or not.

In Texas every owner of land is entitled to its exclusive use. If he takes no steps to guard against intrusion by the cattle of another he cannot complain if they graze upon it. If he incloses it, his inclosure must be respected, even though it is not inclosed with a statutory fence. *Davis v. Davis*, 70 T. 123.

The owner of land, pasturing cattle for pay, is bound to keep up the fences. He cannot recover pay for pasturage of cattle escaping by reason of defective fencing, and is responsible for damages resulting from the loss of cattle. *McAuley v. Harris*, 71 T. 631.

(2.) The statute requiring farmers, gardeners and planters to make a sufficient fence about cleared land in cultivation was designed for the protection of crops inside the inclosure against stock running at large. The failure to keep a fence around a growing crop, which crop in its nature could not be regarded as dangerous to stock, would not render the owner of the ground in possession liable for injury which might result to animals running at large that had entered and been injured by eating of the crop. The failure to erect or keep up the fence would not, under such circumstances, be regarded as negligence. *Fennell v. Railway*, 70 T. 670.

## ART. 2435b. Partition Fences.

§1. DIVISION FENCE MAY BE REMOVED, WHEN.—Hereafter it shall be unlawful for any person who is a joint owner of any separating or dividing fence, or who is in any manner interested in any fence attached to or connected with any fence owned or controlled by any other person, to remove the same, except by mutual consent or as hereinafter provided.

§2. NOTICE SHALL BE GIVEN BEFORE WITHDRAWAL. PENALTY.—Any person who is the owner or part owner of any fences connected with or adjoined to any fences owned in part or in whole by any other person, shall have the right to withdraw or separate his fence, or part of fence, from the fence of any other person or persons in this state; that such person who desires to withdraw or separate such fence from the fence of any other person shall give notice in writing to such person, his agent, attorney, or lessee, of his intention to separate or withdraw his fence, or part thereof, for at least six months prior to the time of such intended withdrawal or separation. Any person failing to comply with the provisions of this section shall be fined in any sum not less than two dollars, nor more than fifty dollars, and every ten days shall constitute a separate offense for the violation of this act.

§3. REMOVAL OF CONNECTING FENCE. PENALTY FOR FAILURE TO REMOVE.—That any person who is the owner of any fence

T. 44, 45.] FISCAL YEAR—FORCIBLE ENTRY & DETAINER. Art. 2440.

wholly upon his own land, to which the fence of another is adjoined or connected in any manner, may require the owner of any such fence to disconnect and withdraw the same back on his own land by first giving notice in writing for at least six months to such person, his agent, attorney or lessee, to disconnect and withdraw his fence back on his own land. That any person who shall negligently or willfully fail to disconnect his fence and remove the same back on his own land after the expiration of said notice, shall be fined in any sum not less than ten nor more than fifty dollars, and each ten days' failure after such notice shall constitute a separate offense for the violation of the provisions of this act. [Amendment April 6, 1889; 21 Leg. p. 45.]

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## TITLE 44.—FISCAL YEAR.

ARTS. 2436 to 2439. See Civil Statutes.

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## TITLE 45.—FORCIBLE ENTRY AND DETAINER.

ART. 2440. In what cases the action will lie. Annotated.	ART. 2441 to 2463. See Civil Statutes.
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ART. 2440. In what cases the action will lie.

(7.) Against a plaintiff suing for possession a purchaser under him on an executory contract for non-payment of purchase money (the purchaser being in possession when the contract was made), the fact that the purchaser was induced by the false representations of the plaintiff that he was the only heir of the former owner in whom title was vested, when in fact there were other heirs from whom defendant purchased to protect his possession, presents a proper defense. In such a case the defendant may retain possession and defeat a recovery, except as to the interest of his vendor.

After judgment in the district court and notice of appeal, an injunction to restrain further proceedings by appellant, until the determination of another suit to which appellant is not a party, will not lie. *Hammers v. Hanrick*, 69 T. 412.

One who unlawfully enters upon and improves a portion of a tract of land when the other portion is in actual possession by the true owner of the entire tract, may maintain an action for damages against the true owner of the land for a forcible destruction of his improvements, his forcible ejection from the premises, and the removal of his personal effects therefrom. The statute provides a speedy remedy for the removal of one who wrongfully disturbs the rightful possession of land by another, and the law will not tolerate a resort to force to dispossess one in peaceable possession. [*Cooley on Torts*, 168; *Dusty v. Corodry et al.*, 23 Vt. 631; *Ruder v. Purdy*, 41 Ill. 281, and *Warren v. Kelley*, 17 T. 551, cited.] *Sinclair v. Stanley*, 69 T. 718.

(8.) A tenant holding under contract with one who assumed without authority to lease the premises, may show a written ratification of the lease by the true owner in a suit for trespass upon the property which was committed prior to the ratification. *Sinclair v. Stanley*, 69 T. 718.

## TITLE 46.—FRAUDS AND FRAUDULENT CONVEYANCES.

<b>ART.</b> <b>2464.</b> Written memorandum required to maintain certain actions. <i>Annotated.</i> <b>2464a.</b> Sale or transfer of judgment, etc., must be by writing. <i>New.</i>	<b>ART.</b> <b>2465.</b> Conveyance to defraud creditors, etc., void. <i>Annotated.</i> <b>2466.</b> Voluntary conveyance. <i>Annotated.</i> <b>2467; 2468.</b> See Civil Statutes.
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**ART. 2464. Written memorandum required.**

(1.) The objection that an agreement for the sale of land was verbal may be raised by demurrer, if the fact appears from the petition [5 T. 552]; and where the defendant pleads general issue, the burden is upon the plaintiff of proving a valid agreement capable of being enforced. [29 T. 411.] *Aiken v. Hale & McDonald*, 1 U. C. 318.

(5.) The verbal promise to hold one harmless if the promisee would become surety on the appeal-bond of a third party is not within the statute of frauds, and may be enforced against the promisor when the surety is compelled to pay the bond. [Pas. Dig., Art. 3875; Throop's Treatise, Ch. 13, Art. II; *Lucas v. Chamberlain*, 8 B. Monroe, 276; *Jones v. Letcher*, 13 B. Monroe, 363; *Jones v. Adm'r of Shorter*, 1 Kelly, 294.] *Campbell v. Pucket*, 1 U. C. 455.

(20.) "Received of J. L. Fisher twenty dollars gold coin, in part pay for a tract of land (1¼) acres in the town of Dallas, the same tract sold to O. P. Bowser by Sarah H. Moore. Having this day sold the same to said J. L. Fisher for one thousand dollars gold coin." *Fisher v. Bowser*, 1 U. C. 346.

(22.) The words "any contract for the sale of real estate," include every agreement by which one promises to alienate an existing interest in land upon consideration either good or valuable; hence, a contract to convey land in consideration of labor or services to be rendered, is within the statute, and every parol contract, in whatever shape it may be put, by which either party is to part with real estate, is unavailing as the ground of a claim.

A parol contract made between an attorney and his client, whereby the former was to receive, in consideration of professional services, to be rendered in removing cloud from title to land then owned by his client, a part of the land, was within the statute of frauds, and specific performance thereof cannot be enforced. *Sprague v. Haines*, 68 T. 215.

(23.) The purchaser of land by parol, who pays a portion of the purchase money, goes into possession and makes improvements thereon, acquires an equitable title thereto, and such possession is notice of whatever right he may have to, or interest in, the land. *Whitset v. Miller*, 1 U. C. 203.

The enforcement of a parol sale of land, when the vendee has taken possession and made valuable improvements, will be decreed on the ground that otherwise a fraud would be consummated on the vendee in possession; and the vendor, under such circumstances, is estopped to set up the statute of frauds to avoid the contract. See this case for facts under which it was held that specific performance of a parol sale of land could not be enforced. *Wooldridge v. Hancock*, 70 T. 18.

(25.) Though a nuncupative will cannot pass title to land, yet it is admissible, when offered in connection with other evidence, to show that the deceased had previously made a parol sale or gift of the land to the devisee. *Wooldridge v. Hancock*, 70 T. 18.

(26.) Land located, surveyed and ready for patent, has, in contemplation of law, been acquired by the owner of the certificate, and a verbal agreement to convey an interest in it to one who procures a patent thereon is not an agreement between the parties whereby each would be entitled to a designated portion, but is within the statute of frauds, and specific performance cannot be enforced. *Aiken v. Hale & McDonald*, 1 U. C. 318.



(30.) An agreement between two or more persons, by which one of the parties agrees to advance money for the benefit of the other in payment for an interest in land already acquired, is not, within the meaning of the statute of frauds, a contract for the sale of real estate. If the party for whom the advance was made tender payment and demand a deed for his interest, in a suit to compel specific performance he is not bound to again tender the money in court. His rights were fixed by his tender in accordance with his contract, and from that date he was entitled to his *pro rata* of the rents and profits of the land. *Gardner v. Rundell*, 70 T. 453.

An agreement between two or more persons for the joint acquisition of land is not, within the meaning of the statute of frauds, a contract for the sale of land which, to be valid, must be in writing. Such a contract is neither prohibited by common or statute law, and when under such a contract the purchase is effected by one of the parties, and the deed is taken in his name, he holds in trust for his associates in the parol agreement, whether he advances only his proportion of the purchase money, or pays from his individual means the entire price under a parol agreement to be reimbursed by them at a future time. Such a trust is not a resulting trust, the latter being that trust which the law creates in favor of one who has furnished the entire purchase money by which title has been taken in the name of another. *Gardner v. Rundell*, 70 T. 453.

A parol partition of lands among joint tenants or tenants in common is not within the statute of frauds nor the statute regulating the transfer of real estate by married women. *Alcock v. Kimbrough*, 71 T. 330.

Owners of adjoining lands agreeing upon and fixing a common boundary line are bound thereby, although the agreement is not in writing. *Edwards v. Smith*, 71 T. 156.

**ART. 2464a, §1. Transfer of interest in suit or judgment must be in writing.**

The sale of a judgment, or any part thereof, of any court of record within this state, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer, which when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed by the clerk, it shall be his duty to make a minute of said transfer on the margin of the minute book of the court where said judgment is recorded of said court, or if judgment be not rendered when such transfer is filed, the clerk shall make a minute of such transfer on the court trial docket when the suit is entered, giving briefly the substance thereof, for which services he shall be entitled to a fee of twenty-five cents, to be paid by the party applying therefor, and this section shall apply to any and all judgments, suits, claims, and causes of actions, whether assignable in law and equity or not.

**§2. TRANSFERS, WHEN FILED, ETC., NOTICE.** When said transfer is duly acknowledged, filed, and noted as aforesaid, the same shall be full notice, and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, *whether* they have actual knowledge of such transfer or not. [Act March 26; July 6, 1889; 21 Leg. p. 103.]

**ART. 2465. Conveyance to defraud creditors, etc., void.**

(1.) A claimant for damages for cutting and carrying away timber without consent of the owner, the claim having been matured into a judgment, is protected as a creditor by the statute of frauds against fraudulent conveyance by the defendants. *Cole v. Terrell*, 71 T. 549.

(6.) A conveyance of land by a parent engaged in the mercantile business was made to her book-keeper, who was her son, who knew the condition of her business; that she was insolvent at the time she made the deed, unable to meet her debts as they fell due, and with assets less than her indebtedness. Under this condition of affairs the deed was made, and the son gave his note for deferred payments, the last of which was paid, and also a balance due the son from the mother was settled, in notes and accounts of the latter, and this after attachments against the mother's property were levied on the land. It was sold under those attachments, and in a contest between the purchaser at foreclosure sale and the son, *held*:

The natural and ordinary result of the transaction was to withdraw the land from the reach of creditors; this the parties must be held to have intended, with a view of hindering and delaying creditors. Had the land been conveyed in satisfaction of a pre-existing debt, the conclusion might be different. *Plum v. McBride*, 69 T. 60.

A sale by a debtor for purpose of defrauding his creditors is void when his vendee had notice of facts sufficient to put a man with ordinary prudence upon notice of the purpose of the vendor. [*Blum v. Simpson*, 66 T. 84.] *Blum v. Simpson*, 71 T. 268.

(7.) A debtor, though in failing circumstances, has the right, in making an assignment of his property for the benefit of his creditors, to prefer creditors, if done *bona fide*; and if the purpose is to pay honest debts, either by a general distribution, or by expressing a preference among his creditors, it will be valid. [*Baldwin v. Peet*, 22 T. 717.]

Reserving trifling amounts by a debtor in making an assignment is no indication of fraud, and that most of the claims assigned are worthless is no objection to the assignment, when it appears they were all he had. (*Post*, *Black v. Vaughn*, 70 T. 47.)

Where the deed imposes no terms upon the creditors, the law presumes the acceptance by the creditors of an assignment for their benefit. [22 T. 708; *post*, *Kellogg v. Muller*, 68 T. 182.]

A debtor is not bound to plead the statute of limitation, and it is no objection to a deed of assignment that a debt barred by limitation is included in the list of his liabilities, or that some of his debts were due his kinsman.

The individual debts of a debtor making an assignment have no preference over those owing by him as a member of a partnership. [*Higgins v. Rector*, 47 T. 361.]

It is error to set aside a deed of assignment, and still require the assignee to administer the debtor's estate for the benefit of the creditor attacking the assignment. *Swearingen v. Hendley & Co.*, 1 U. C. 639.

A sale by a failing debtor for the purpose of applying the proceeds of sale to the payment of his debts, is not fraudulent as to creditors not sharing in the proceeds of such sale. *Sweeney v. Conley*, 71 T. 543.

The law never presumes that a transfer of property was made with fraudulent intent when made to one to whom the vendor is indebted. Such a presumption has only been indulged as applicable to voluntary transfers or gifts; never when a valuable and adequate consideration has been paid by the purchaser. *Willis & Bro. v. Whitsitt*, 67 T. 673.

An insolvent debtor has the right to transfer a debt due himself as a collateral, to secure his debt to another, and a reservation to himself in the transfer, of any balance that may remain after the satisfaction of his own debt, does not render the transfer fraudulent. The validity of such a transfer and reservation depends on the good faith which influenced the insolvent to provide for a *bona fide* debt which he proposed to pay, and the absence of intent to hinder, delay or defraud other creditors. The reservation of the right of the debtor to receive the balance remaining, after payment of the debt, does not of itself render the transfer fraudulent. *McClure v. Sheek's Heirs*, 68 T. 426.

A creditor may receive goods in payment of his debt, though it may result in hindering other creditors, *provided* the goods taken are in value reasonably proportioned to the debt extinguished, *and, provided also*, that the debtor reserves to himself no benefit in the goods thus transferred.

The goods thus used in the payment of the debt must be no more in value than reasonably necessary to discharge the debt. A slight excess in value will not vitiate the transaction.

The commissions which a debtor by agreement is to receive on a stock of goods to be sold by him, which he had transferred to his creditor in payment of a debt, and which he was to retain possession of and sell for such creditor, is not the reservation of such an interest in the property as will vitiate the transaction for fraud.

See opinion of the court for facts under which it was held that a judgment should be reversed, based on conclusions of fact found by the trial judge, under which he found that a sale of goods by a debtor to his creditor in satisfaction of the debt was fraudulent. *LaBelle v. Tidball*, 69 T. 161.

A creditor may not only lawfully receive from his debtor with notice of the insolvency of the latter, enough property to pay his debt, but he may receive more of such property than would in value be adequate to discharge the debt, *provided* he is bound by the terms of the sale to see that the excess of purchase money over his debt is honestly applied to the payment of other debts, and secures it to be thus appropriated. If, however, the preferred creditor executes his note for the excess to the vendor, he contributes to place the excess beyond the reach of other creditors, thus tainting the entire transaction, so that it becomes fraudulent in law. *Elsner v. Graber*, 69 T. 222.

A failing debtor may prefer a creditor, and pay his debt by transferring to him property reasonably proportionate to its amount; and it is immaterial that the creditor knew that other creditors would be hindered and delayed by the transfer. *Smith v. Whitfield*, 67 T. 124.

A debtor in failing circumstances has the right to prefer a creditor, and to this end to sell out to him his entire stock of merchandise; if the goods thus transferred in payment are not of value more than the debt, no fraud is perpetrated, *provided* the only purpose of the creditor who receives payment in this manner is to collect his debt.

If, however, the merchandise thus conveyed exceeds in value the sum due, and the creditor being aware of this fact, and of the debtor's insolvency, pays to the creditor a sum of money to induce the transfer, whereby other creditors are prevented from enforcing their claims against so much of the goods as are not necessary to pay the preferred creditor's claim, then the conveyance should be deemed fraudulent, and the entire transaction void as to other creditors.

In determining the liability of the purchasing creditor, in a suit by other creditors, if the purchase be deemed fraudulent, the value of the goods transferred in payment of the preferred claim at the time of their transfer and conversion, is the measure of the preferred creditor's liability, and not the sum realized afterwards from their sale. *Oppenheimer v. Halff & Bro.*, 68 T. 409.

A creditor may lawfully receive from a failing debtor in payment property reasonably proportioned in value to the amount of the debt, but if he receives property of greater value than the amount of the debt, and pays the excess to the failing creditor, he aids the latter to place his property beyond the reach of his creditors, and the transfer will be set aside, not only to the extent of the excess in value, but as to all the property transferred. [*Ante*, *Swearingen v. Hendley*, 1 U. C. 639.] *Black v. Vaughn*, 70 T. 47.

A conveyance which contains no condition of defeasance, and which passes the property absolutely to another, to be administered by him according to its terms, first to pay a preferred debt from the proceeds of the property and to appropriate the balance to the satisfaction of other debts, cannot be regarded as a mortgage, but must be treated as an assignment.

Such deed of assignment, which contains nothing on its face to show that the assignor was insolvent, or made the conveyance in contemplation of insolvency, is not a statutory assignment. It did not purport to convey all the property of the assignor, and though its chief object was from its terms to secure a preferred creditor, there being no evidence of the intention to defraud, it must be held valid at common law.

Such an assignment, made by one partner in a firm, the other partner being absent from the state, when made to secure a firm debt, is a valid conveyance.

Such an assignment is not rendered invalid by the fact that its execution was induced by threats of the assignee to attach the property of the assignor to enforce payment of his debt. *Johnson v. Robinson*, 68 T. 399.

The obvious effect of a clause in an assignment for the benefit of creditors, which authorizes sales upon credit, is to delay creditors, and hence such a clause is regarded as a badge of fraud. If, however, the assignment authorizes a sale of the goods, furniture and book accounts, "converting the same into cash or its equivalent," such a clause cannot be construed as having the effect to produce such delay; it is not a badge of fraud; but if it were, a court would not be authorized to hold the deed void on its face.

Though a deed of assignment is void which names none of the beneficiaries, yet such a compliance with the rule requiring them to be named as the circumstances surrounding the assignor at the time of executing the deed will permit, is all that the law requires. Hence a deed which mentions by name the creditors who are embraced by it in class No. 1 and class No. 2, and which proceeds to recite that if there be other creditors who have been forgotten whose claims are just, they shall be embraced in class No. 2, was held sufficient. This case distinguished from *Caton v. Moseley*, 25 T. 374. [*Ante*, *Swearingen v. Hendley*, 1 U. C. 639.]

An attaching creditor claiming the proceeds of the debtor's property, which had been conveyed by valid assignment for the benefit of named creditors, must show that the claims enumerated in the deed of assignment have been paid, in order to subject the fund in the hands of the assignee to the satisfaction of his debt. *Kellogg & Co. v. Muller*, 68 T. 182.

(8.) A failing debtor by bill of sale conveys to one of his creditors his stock of goods, and immediately thereafter the creditor, by written contract, employs the debtor to take charge of and sell the goods. *Held*:

1. The two instruments may be read together as evidencing the transactions between the two parties.

2. That the employment of the debtor is not fraud *per se*, but only a badge of fraud, to be explained by circumstances.

3. That, there being nothing to show that the debt for which the transfer was made was kept in existence, the transaction was not a mortgage.

A creditor can take from a failing debtor goods in payment of his debt, although the effect be to hinder other creditors. Only so much can be taken as reasonably sufficient to discharge the debt; but a slight excess, not taken by design, will not avoid such transaction. *Harness Co. v. Schoelkopf*, 71 T. 418.

(10.) A fraudulent grantee is substituted to the rights of his grantor in the property conveyed, which is subject only to the rights of the creditors of the grantor, and it is the right of such fraudulent grantee to compel such creditors to pursue strictly the procedure provided by law for the enforcement of their claims.

If property fraudulently conveyed be seized under legal process to satisfy the debt of the grantor, and it is sold for a grossly inadequate price, under irregular proceedings, the fraudulent grantee can, by proper proceedings, have the sale set aside. The right of such grantee is subordinate only to that of the creditors, and his participation in the fraud does not place him beyond the pale of protection in reference to their illegal acts.

Indexing is necessary to perfect judgment lien upon recording abstracts. *Miller v. Koertge*, 70 T. 162.

(13.) One in possession of land under a parol gift claiming it as his own, and who afterwards receives a deed for the same, cannot be affected by the claim of a creditor of the donor when the credit was extended after the date of the parol gift, and after actual occupancy of the donee.

In an action by the creditor against the donee to subject the property to the payment of a note given by the donor, which covered items of indebtedness antedating the parol gift, as also debts subsequent to the gift, it was shown that the creditor received cotton from time to time from the debtor. If it was the agreement between the debtor and creditor that the proceeds of sales of such cotton should be applied to the payment of debts antedating the parol gift, the donee can, in his protection, enforce such an application of the proceeds of sale. *Willis & Bro. v. McIntyre*, 70 T. 34.

**T. 46.]      FRAUDS AND FRAUDULENT CONVEYANCES.      Art. 2466.**

(17.) The creditor and vendee are the only necessary parties to a suit to set aside, as fraudulent as to creditors, the deed of one who died without property, and on whose estate no administration has been taken out.

A vendor having died without property and on whose estate no administration has been granted, the district court alone has jurisdiction of a suit by a creditor against the decedent's vendee to set aside as fraudulent a deed from the deceased, and subject the property conveyed to the payment of his debts; and to sustain a demurrer to the petition for want of jurisdiction is erroneous. [7 T. 235; 22 T. 7; 46 T. 566; 13 T. 338.] *Heard v. McKinney*, 1 U. C. 83.

**ART. 2466. Voluntary conveyance.**

(1.) Where it is shown that at the time of a gift by a husband to his wife, the husband had lands subject to execution in excess of his indebtedness, such gift is valid.

Nor can such gift be avoided by a subsequent creditor by merely showing that it was without consideration. *Terry v. O'Neal and Son*, 71 T. 592.

(2.) While a mere voluntary conveyance cannot be attacked by subsequent creditors, yet where such conveyance is satisfactorily shown to have been made with intent to defraud a creditor, such creditor can attack the conveyance, and, on showing such fraud, the conveyance will be set aside and the property subjected to the judgment. *Cole v. Terrell*, 71 T. 549.

(3.) Where a party, engaged in unlawfully cutting timber upon the lands of another, is shown to have contemplated a continuance of such trespasses, makes a voluntary conveyance of all his property, such facts are sufficient to support a finding of the fraudulent intent, and to avoid the conveyance in favor of the owner of the land upon which such trespasses were committed. *Cole v. Terrell*, 71 T. 549.

## TITLE 47.—GUARDIAN AND WARD.

### CH. 1.—GENERAL PROVISIONS.

ARTS. 2469 to 2481. See Civil Statutes.

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### CH. 2.—IN WHAT COUNTY PROCEEDINGS SHALL BE COMMENCED.

ART.

2482, 2483. See Civil Statutes.

2484. For orphan, shall be commenced where. *Annotated.*

ART.

2485, 2486. See Civil Statutes.

ART. 2484. For orphan, shall be commenced where.

(1.) Under the act of March 16th, 1848 (Early Laws, Art. 1853, §2), it was held that the county court had authority to appoint a guardian for minors, non-residents of this state, who had estates here, and to order the sale of property as in other cases. *Neal v. Bartleson*, 65 T. 478.

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### CH. 3.—COMMENCEMENT OF PROCEEDINGS.

ARTS. 2487 to 2493. See Civil Statutes.

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### CH. 4.—PERSONS ENTITLED TO BE APPOINTED GUARDIANS, ETC.

ARTS. 2494 to 2505. See Civil Statutes.

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### CH. 5.—APPOINTMENT OF GUARDIANS.

ARTS. 2506 to 2516. See Civil Statutes.

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### CH. 6.—OATH AND BOND OF GUARDIANS.

ARTS. 2517 to 2530. See Civil Statutes.

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### CH. 7.—INVENTORY, APPRAISEMENT AND LIST OF CLAIMS.

ARTS. 2531 to 2539. See Civil Statutes.

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### CH. 8.—POWERS AND DUTIES OF GUARDIANS.

ARTS. 2540 to 2551. See Civil Statutes.

**Art. 2596.**

**ARTS. 2552 to 2569. See Civil Statutes.**

**ARTS. 2570 to 2589. See Civil Statutes.**

**ART.**  
**2597 to 2600. See Civil Statutes.**

**ACTS. 2601 to 2608. See Civil Statutes.**

**ARTS. 2609 to 2620. See Civil Statutes.**

**ARTS. 2621 to 2652. See Civil Statutes.**

**APTS. 2653 to 2670. See Civil Statutes.**

**ARTS. 2671 to 2675. See Civil Statutes.**

## CH. 17.—REMOVAL OF GUARDIANSHIP.

ARTS. 2676 to 2681. See Civil Statutes.

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## CH. 18.—FINAL SETTLEMENT.

ART.  
2682. When guardianship shall be settled. *Annotated.*

ART.  
2683 to 2696. See Civil Statutes.

ART. 2682. When guardianship shall be settled.

(2.) The recital in a judgment approving the accounts of a guardian and discharging him from the guardianship, that the ward had arrived at full age, will not, in a suit brought against the guardian by the ward to revise the final settlement, conclude him from showing that he was still a minor when the final settlement was made and the judgment rendered. *Jones v. Parker*, 67 T. 76.

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## CH. 19.—COMPENSATION OF GUARDIAN, ETC.

ARTS. 2697 to 2706. See Civil Statutes.

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## CH. 20.—APPEAL, BILL OF REVIEW, AND CERTIORARI.

ART.  
2707 to 2716. See Civil Statutes.  
2717. Bill of review may be brought. *Annotated.*

ART.  
2718. See Civil Statutes.

ART. 2717. Bill of review may be brought.

(3.) It is the policy of the law to settle in one suit the interests and rights of all the parties to it; hence, though the district court has no original jurisdiction to pass on a guardian's account, yet when in a suit between the guardian and ward, which from its nature involves the adjudication of the entire affairs of the ward's estate, in ascertaining what property the ward is entitled to, it is competent for the court to determine and allow proper commissions for services rendered by the guardian in collecting and paying out the money of the estate. *Eckford and Wife v. Knox*, 67 T. 200.

(16—Sup. Tex. Stat.)



## TITLE 48.—HEADS OF DEPARTMENT.

### CH. 1.—SECRETARY OF STATE.

ARTS. 2719 to 2734. See Civil Statutes.

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### CH. 2.—COMPTROLLER OF PUBLIC ACCOUNTS.

ARTS. 2735 to 2760. See Civil Statutes.

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### CH. 3.—STATE TREASURER.

ART.  
2761 to 2766. See Civil Statutes.  
2767. How money is to be paid out.  
*Annotated.*

ART.  
2768 to 2775. See Civil Statutes.

ART. 2767. How money is to be paid out.

(1.) The holder of a warrant, drawn by the comptroller of the state upon its treasurer, who sells his warrant at a discount, because of a want of funds to meet it, cannot hold the state liable for the loss he thereby sustains.

The delivery of warrants to a contractor, in payment upon his contract, is not payment in a depreciated currency when there is no money in the treasury to meet such warrant. The state's contract, even for money, was to cause warrants to be issued by its comptroller and paid by its treasurer. The delivery of warrants is not in payment, but as evidence of the indebtedness and authority to the treasurer to make the payment.

[*Tyers v. U. S.*, 5 Ct. of Cl. Rep. 509; *Walkup v. Houston*, 65 N. C. 50; *Foster v. Coleman*, 10 Cal. 276. discussed.]

A treasury warrant is but a promise to pay in legal effect, and a holder of such promise, after discounting it, would have no further claim upon the maker.

Nor would the sanction of the governor to such discounting, with promise to make up the loss, have any effect upon the liability of the state.

Besides, section 44, article 3, of the Constitution, prohibits the appropriation of money upon a claim not provided for by a pre-existing law, which applies to the claim urged in this suit. *The State v. Wilson*, 71 T. 291.

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### CH. 4.—COMMISSIONER OF THE GENERAL LAND OFFICE.

ARTS. 2776 to 2794. See Civil Statutes.

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### CH. 5.—ATTORNEY-GENERAL.

ARTS. 2795 to 2811a. See Civil Statutes.

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### CH. 6.—COMMISSIONER OF INSURANCE, STATISTICS, AND HISTORY.

ARTS. 2812 to 2823. See Civil Statutes. (*Ante*, Title 2.)

## CH. 6a.—EMPLOYEES.

ART. 2823a. See Civil Statutes.

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## CH. 7.—OF THE MODE OF SUPPLYING FUEL, ETC.

ARTS. 2824 to 2834. See Civil Statutes.

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## TITLE 49.—HOLIDAYS, LEGAL.

ART.

2835. See Civil Statutes.

2835a. February 22d designated as  
"Arbor Day." *New.*

ART.

2836, 2837. See Civil Statutes.

**ART. 2835a. February 22d designated as "Arbor Day."**

*Whereas*, it is desirable to encourage the planting of trees in this state with the view to supplying shade and timber to the prairies and to the preservation of our forests; therefore,

The 22d day of February of each year, the same being now a legal holiday, be further set apart and designated as "Arbor Day," to be devoted to the planting and cultivation of forest, shade, and ornamental trees throughout the state, and to be observed for that purpose in such manner as may seem best to the people of each community. [Act Feb. 22, 1889; 21 Leg. p. 78.]

## TITLE 50.—HUSBAND AND WIFE.

## CH. 1.—CELEBRATION OF MARRIAGE.

ART.  
2838. Who are authorized to celebrate  
rites. *Amendment.*

ART.  
2839 to 2846. See Civil Statutes.

## ART. 2838. Who are authorized to celebrate rites.

All regularly licensed or ordained ministers of the Gospel, Jewish rabbis, judges of the district and county courts, and all justices of the peace of the several counties are authorized to celebrate the rites of matrimony between all persons legally authorized to marry. [Amendment March 29; July 6, 1889; 21 Leg. p. 10.]

NOTE.—This act is entitled: “*An act to amend title 50, article 2838, of the Revised Statutes, so as hereafter to read as follows:*”

Sec. 29, Art. 111, of the Constitution reads as follows: The enacting clause of all laws shall be, “Be it enacted by the Legislature of the State of Texas.” (4 Civ. Stat. 515.) This act has no enacting clause as above defined. The second section of the act reads as follows: Sec. 2. *Whereas*, there is no law in this state authorizing Jewish rabbis to perform the marriage ceremony, creates an emergency that this law take effect and be in force from and after its passage, and it is so enacted.

It appears that this act originated in the Senate, and passed the same, and passed the House by a vote of 75 yeas, 3 nays, and was approved March 29th, 1889.

## CH. 2.—MARRIAGE CONTRACTS.

ARTS. 2847 to 2850. See Civil Statutes.

## CH. 3.—RIGHTS OF MARRIED PERSONS.

ART.  
2851. Separate property. *Annotated.*  
2852. Community property. *Annotated.*  
2853. See Civil Statutes.

ART.  
2854. Wife may contract debts, when.  
*Annotated.*  
2855 to 2859. See Civil Statutes.

## ART. 2851. Separate property.

(1.) The interests of the husband and wife are equal in all property, both real and personal, acquired during the continuance of the marriage relation, except that acquired by gift, devise or descent, and the increase of lands thus acquired, and this whether the deed thereto be taken in the name of either, or the names of both.

That portion of the opinion in *Garner v. Thompson*, Texas Law Review, May, 1883, which was decided by the commissioners of appeals, which declares that the purchaser must take notice of the title papers of the land he purchases, our marital rights laws, the existence of the vendor's family, and their rights to the land, was not called for in the decision of the case where there was nothing in the conveyance to show that the grantor was, at the time of the sale, a married man, and must be regarded as *obiter dicta*.

If title to property be in the name of the husband alone, a purchaser from him who has paid value without actual notice of the wife's interest, will be protected

against her claim or the claim of her heirs. *Edwards and Wife v. Brown*, 68 T. 329.

The application of the separate funds of the wife in part payment of a tract of land, with her approval, gives her a proportional interest in the land, and when the deed is taken by the husband in his name, the trust in favor of the wife is created, and she becomes the equitable owner of such proportional interest.

Such equitable interest in the land is not lessened by subsequent improvements upon the land. A creditor cannot require an account to be taken of costs of the land and improvements. Only the community interest in the land is subject to execution. *Blum v. Rogers*, 71 T. 669.

(3.) In 1854 a married man obtained a patent to land in his own name, as assignee of the certificate under which it was located. The wife obtained a divorce in 1862, but neither claimed or had set apart to her any property. The husband died, leaving a second wife, to whom he devised the land. The second wife sold the land to one who was ignorant of the fact that the husband had ever before been married, and who, on examination of the records, found a title down to his vendor, perfect on its face. In an action by the divorced wife against the purchaser to recover a community interest in the land, *held*, that the purchaser acquired the title. *Edwards and Wife v. Brown*, 68 T. 329.

(16.) When it is made clearly to appear that the husband has taken an obligation from a third party, which by its terms purports to vest in the wife, as her separate estate, any interest or right, the contract will be regarded as consummated, though the paper which evidences the right of the wife has never been actually delivered to her, or to any third person for her, and the thing or interest denoted has remained under the control of the husband.

The law which invests the husband with the sole management of the separate estate of the wife, clothes him with all power necessary or incident to the exercise of his authority, but gives him no power over matters affecting her right or title to the property, nor does it authorize him to perform any act by which her title may be endangered.

Though in this state the husband does not hold title to his wife's separate estate in trust for her, yet, when a conveyance is made to a wife for her separate use and benefit, and no trustee is named, the husband becomes, by virtue of the authority with which the statute invests him, essentially a trustee, and with reference to the specific property he is charged with duties, for the violation of which any estate subject to the payment of his debts is liable.

When the wife's separate estate consists of securities, which may be legally converted into money, the husband cannot, after conversion, appropriate it to the payment of debts for which the wife's separate estate is not liable, or mingle it with funds belonging to himself or the community estate, or invest it in his own name, without rendering his estate liable for its repayment. [On this point the cases of *Gover v. Owings*, 16 Md. 99; *Dent v. Slough*, 40 Ala. 523; *Andrews v. Huckalee*, 30 Ala. 156; *Green v. Brooks*, 25 Ark. 318, and *Walker v. Walker*, 9 Wallace, 753, cited and approved.] *Richardson v. Hutchins*, 68 T. 81.

While it is true that the declaration of the husband made at the time when title to land is taken in his wife's name, to the effect that he intended it to be her separate property, would make it such, as to him and his heirs, and that a declaration under like circumstances that he intended that it should be community property, would give it that character, yet, when in her name he applies for and acquires school land, though his declarations made at the time are important in determining his true intent, when the rights of third parties are involved, all the facts and circumstances surrounding the acquisition of title should be carefully considered to ascertain the separate or community character of the wife's interest. *Mining Company v. Bullis*, 68 T. 581.

The husband cannot, by making improvements with his separate means on land, the separate property of his wife, acquire thereby any lien upon or interest in the wife's separate estate, which, by his deed, he can convey to another. *McDonna v. Wells*, 1 U. C. 35.

#### ART. 2852. Community property.

(1.) The presumption is that all property in the name or apparent possession and ownership of either husband or wife is community property, and the holder of a note payable to a married woman, transferred by the husband in due course of trade, without notice that it was in fact the wife's separate property, takes a separate title thereto.

Property in the name or possession of either husband or wife is *prima facie* community property, and third persons, in ignorance of the separate interest of the wife in it, will be protected in acting upon that presumption. [26 T. 320; 15 T. 283; 7 T. 9.]

The purchaser from the husband of land, the deed to which is made to the wife, is not thereby put upon inquiry as to any equity she might have in respect to it, but is protected if he buys in ignorance of her claim to it as separate property. [49 T. 213; 27 T. 457.] *Linn v. Willis*, 1 U. C. 168.

The testimony of the husband to the effect that property possessed jointly by himself and wife when she died was her separate property, cannot control the legal effect which attaches to the detail of facts connected with its acquisition, which impress it with the character of community property. *Peet v. Railway*, 70 T. 522.

A widower with children emigrating to Texas in 1833 or 1834 was, by the colonization laws, entitled to one league and labor of land as a head of a family. This right was secured under the Constitution of the Republic. [Sec. 10, Gen. Prov.]

The act of December 14th, 1837, creating the board of land commissioners, charged the board with the duty of granting certificates to those who should show themselves entitled to them, setting forth in the certificate the amount of land the claimant was entitled to, upon what conditions, and the time such claimant came to the country.

The grant of a headright certificate in 1838 to a married man, reciting that fact and the date of his immigration to Texas, does not constitute such certificate community property when the grantee had immigrated with his children, and had married subsequent to his arrival in Texas, although the parties were living together as husband and wife at the date of the certificate. *Boone v. Hulsey*, 71 T. 176.

Land acquired by a surviving husband under an act of the Legislature granting land to settlers in Peters' colony, passed after the death of the wife, is the separate property of the husband, and the children of the deceased wife have no interest in it, the wife having died before she or they possessed either a title to the land or any rightful legal or equitable claim against the state for it. *Mc-Reynolds v. Bowlby*, 1 U. C. 452.

Parties married in 1848 acquired a right to a certificate for six hundred and forty acres of land in Mercer's colony. In 1855 they are divorced. Subsequent to the divorce the husband obtained the land certificate, located it and procured patent in his name. He conveyed one-half of the land to a deputy district surveyor. Suit was brought by the heirs of the husband for the unsold half of the survey against defendants, showing no title under the divorced wife. *Held*:

1. After a divorce the husband could only bind his half interest by any new contract, and, therefore, could not bind the wife's interest by a contract for one-half locative interest.

2. A sale of one-half interest in the land would convey his entire interest therein, and the purchaser would take his interest, whether made in consideration for services in locating, etc., or for other consideration.

3. The remaining half, if the sale by metes and bounds made an equitable division, would be the property of the wife, with legal title in the husband or his heirs.

4. In absence of any connection by the defendants with the equitable title of the wife, the plaintiffs were entitled to recover the land sued for. *Goode v. Jasper*, 71 T. 48.

One who bought from the state school lands in the name of his wife, because he had already applied for as many sections as the law entitled him to purchase in his own name, and who thus bought in pursuance of a contract with other parties, by the terms of which they also should purchase other sections, all of which were to be used by the contracting parties for mining purposes, must be presumed, in the absence of evidence, to have used community funds in acquiring the lands thus applied for in the wife's name, and which were patented to her. If, at the time of the application to purchase, it was the intention of the husband that the land afterwards patented to the wife should belong to her, then, as to the husband and his heirs, and those claiming under him with notice, the land would be regarded as the separate property of the wife.

Title to school land acquired by purchase from the state by a married woman, subjects the property to the same presumption that it is part of the community estate that would obtain if the title had been acquired from an individual. The fact that the statute, at the time of the purchase, prohibited the husband from acquiring more school land than he had already applied for, and that on that account he had applied for it in his wife's name, would not, without other evidence, be sufficient to divest the land thus titled to the wife of its community character. *Mining Company v. Bullis*, 68 T. 581.

While the third section of the act of 1848 (Early Laws. Art. 1834, §3) defined what shall be community property, it did not regulate the form of conveyance which should be necessary to vest title. Property conveyed either to husband or wife during the matrimonial union may be shown to be the separate property of either spouse by satisfactory evidence that it was paid for with separate funds. *Edwards and Wife v. Brown*, 68 T. 329.

(7.) Interest derived from bonds, which are the separate property of the wife, is community property, which the husband may use without being liable therefor to his wife, unless such interest by gift from the husband become also her separate estate, and was afterwards converted by the husband to his own use. *Richardson v. Hutchins*, 68 T. 81.

(9.) A wife contracted to purchase for herself property, partly on credit, consisting of two lots. The wife had a separate estate; the husband had no property, and the note of the husband was taken for the deferred payment, though neither the vendor nor the wife expected payment to be made by the husband. The cash payment was made from the wife's separate property, and was applied to one lot. The deferred payment was also made of the wife's separate means, and completed the payment for it. The deed was made to the separate use of the wife, and retained a vendor's lien on the lot not paid for. *Held*, that, in the absence of fraud or collusion, there was nothing in the purchase contravening either the law or public policy, and which would make the property purchased community property. *Ullmann et al. v. Jasper*, 70 T. 446.

#### ART. 2854. Wife may contract debts, when.

(10.) The burden of proof is upon a married woman, who claims as separate property a stock of goods seized for the husband's debt, with which she was doing business as a merchant, to show that she purchased them with cash of her separate means, and if the property made by sales were mingled with her separate money in purchases, to show how much of her separate money she used in buying the goods. If she mingles the gains of the business in replenishing her stock from time to time, and is unable to show how much of her separate means was invested in the goods at the time of the seizure for the debt of the husband, she cannot protect them as her separate property. *Jones v. Epperson*, 69 T. 536.

(11.) A wife, when abandoned by her husband, is thereby empowered to manage and dispose of her separate property.

It is not requisite that a necessity for selling exist to confer power to sell the separate property upon a wife who has been abandoned by the husband.

Such necessity for selling must exist to enable the wife to sell community property. This has its existence for protection of the delinquent husband. *Clements v. Ewing*, 71 T. 370.

### CH. 4.—DIVORCE.

#### ART.

2860. See Civil Statutes.

2861. Divorce granted in what cases.  
*Annotated.*

#### ART.

2862 to 2872. See Civil Statutes.

#### ART. 2861. Divorce granted in what cases.

(1.) The mere charge of adultery on the part of the husband made by the wife, though the charge be repeatedly made and be false, is no sufficient grounds for divorce in favor of the husband. *McAllister v. McAllister*, 71 T. 695.

(3.) That a wife at one time expressed fear that her husband would poison her is not cause for divorce.

After the act alleged as grounds for divorce, it appeared that the husband seeking the divorce endeavored to induce the wife to live with him, negatives the allegation, necessary to authorize a judgment for divorce, that the act was such as to render their living together insupportable. *Sapp v. Sapp*, 71 T. 348.

(6.) Accusations against the wife of marital infidelity, repeatedly and publicly made by the husband, if groundless, constitute such cruel treatment as renders their living together insupportable; and the wife is presumed innocent until the contrary be proved. [Rev. Stat., Art. 2861.] *Williams v. Williams*, 67 T. 198.

(12.) In suits for divorce on the ground of "cruelty" and "outrageous conduct," the jury or court should pass upon the effect the specific charges have, or are likely to have, upon the plaintiff, whether or not it be insupportable; and to sustain a demurrer to a wife's petition for divorce, alleging on the part of her husband towards her "a studied course of insults," "publicly charging her with taking his money," "cursing her," and calling her "a strumpet and a bitch," is erroneous. [*Taylor v. Taylor*, 18 T. 578; *Sheffield v. Sheffield*, 3 T. 87; *Rogers v. Rogers*, 6 T. 545; *Pinkard v. Pinkard*, 14 T. 357; *Sharman v. Sharman*, 18 T. 525; *Wright v. Wright*, 6 T. 18.] *Spruill v. Spruill*, 1 U. C. 244.

It is settled law that the husband cannot have a marriage annulled because the wife was with child by him at the date of the marriage. If a condition of pregnancy at that time is, under any circumstances, an impediment to marriage, it must be because it will impose upon the husband a spurious offspring. If it on the contrary yields him as the first fruits a child of which he is the father, the contract cannot be annulled, as its object is in no wise defeated. All the rights and privileges to which the husband is entitled are secured to him, and he cannot complain of the consequences of his own misconduct, especially when it has done him no injury. These principles are abundantly supported by authority, and need not be further elaborated.

The presumption, strengthened by proof, being that the appellant was the author of the condition of the wife at marriage for which he seeks to annul it, and no proof to the contrary having been produced, we think he showed no grounds for divorce, and the court below properly refused to grant his petition. The judgment is affirmed. *McCulloch v. McCulloch*, 69 T. 682.

## TITLE 51.—INJUNCTION.

## ART.

2873. See Civil Statutes.

2873a. Injunction granted to restrain violation of revenue or penal law. *New.*

2874, 2875. See Civil Statutes.

2876. Injunction granted on sworn petition. *Annotated.*

2877 to 2880. See Civil Statutes.

## ART.

2881. The bond for injunction. *Annotated.*

2882 to 2890. See Civil Statutes.

2891. Dissolution in term time or vacation. *Annotated.*

2891 to 2897. See Civil Statutes.

2898. Principles of equity applicable. *Annotated.***ART. 2873a, §1. Injunction granted to restrain violation of revenue or penal law.**

The full right, power, and remedy of injunction may be resorted to and invoked by the state at the instance of the county or district attorney or attorney-general, to prevent, prohibit, or restrain the violation of any revenue or penal law of this state.

§2. REMEDY CUMULATIVE. The right and remedy hereby provided shall be cumulative of other laws now in force in the state. [Act May 12; August, 14, 1888; 20 Leg. S. S. p. 8.]

**ART. 2876. Injunction granted on sworn petition.**

(1.) Jung owned and resided upon a tract of land; with him lived one son; another with his family lived in a house upon the tract. Adjoining the Jung homestead lies a tract of land owned by the Roman Catholic church, the legal title being in Neraz, the bishop. Jung and his two sons joined as plaintiffs, sought to enjoin Neraz from establishing a cemetery upon the land, complaining that the burial of the dead in that place would poison the wells upon the land of complainants, would pollute the atmosphere and otherwise injure their homestead as a residence. *Held:*

1. The bishop was the proper party defendant.

2. That the sons of the owner in fee, residing upon their father's homestead, were properly joined as plaintiffs; and,

3. That the allegations as to the threatened and permanent injury, etc., were grounds for equitable relief by injunction. *Jung v. Neraz*, 71 T. 396.

(2.) He who seeks to restrain improper or unlawful conduct on the part of a public officer must set forth facts showing that he has such an interest in the public welfare as to make him a proper party to prevent the commission of a public wrong. An allegation that the party seeking such restraint by injunction is a resident of the county and tax-payer, is generally sufficient to show such interest, but the writ cannot properly issue, unless it be alleged that the plaintiff's right will be greatly and irreparably injured by the acts of the officer who he seeks to restrain. *Caruthers v. Harnett et al.*, 69 T. 127.

(6.) A petition for injunction alleged that the defendant paid off a judgment against plaintiff, agreeing to take in payment of the money so advanced a certain tract of land; that in pursuance of this agreement defendant was put in possession, and was still in possession of the land, but, claiming to be the owner of the judgment, had sued out execution, levied it upon plaintiff's lands, and would cause the same to be sold if not enjoined. *Held*, the petition showed good grounds for a writ of injunction. *Love v. Powell*, 67 T. 15.

Where the plaintiff's title is derived through a married woman, the conveyance to her having been made during the marriage, if it was in fact her separate property, injunction will lie to restrain a sheriff's sale thereof under a judgment against the husband, because the law presumes it to be community property, and subject to the payment of the husband's debts, and the sheriff's sale would cast a cloud upon the title, the invalidity of which could only be shown *dehors* the record. [*Huston v. Curl*, 8 T. 239; *Mitchell v. Marr*, 26 T. 320; *Smith v. Boquet*, 27 T. 512; *Dunham v. Chatham*, 21 T. 244; *Kirk v. Navigation Co.*, 49 T. 213; *High on Injunctions*, Secs. 270, 272.] *Robt v. Dailey*, 1 U. C. 247.



(7.) The remedy by injunction to prevent a cloud upon a title by a sale of the property under execution, will only lie where the invalidity or illegality of the title alleged to be a cloud can alone be shown by evidence *dehors* the record, and not where such illegality or invalidity appears upon the face of the proceedings themselves.

A second sale of the same interest in property under execution on the same judgment does not create such a cloud upon the title as injunction will lie to prevent. *Ryburn v. Geizendaner*, 1 U. C. 349.

No action lies to restrain an interference with a mere public right at the suit of one who has not suffered, or who is threatened with some damage peculiar to himself, or been threatened with it. When the injury inflicted (or threatened) is of a character which affects the public generally, and inflicts no special wrong on the individual, the suit must be brought by those who are intrusted with that duty by the Legislature. The rule was otherwise under the laws of Spain, but they were abrogated by the adoption of the common law in the Republic of Texas, and the remedy afforded by the laws of Spain to the individual in cities established before the revolution of 1836 did not so vest as to survive the change of laws when the common law was adopted. Even the laws of Spain did not confer the right on a private citizen to sue for damages done by the city itself, in erecting a structure and place dedicated to public use. *San Antonio v. Strumberg*, 70 T. 366.

(8.) The power conferred by the Constitution of 1845 on district courts to exercise general supervision and control over inferior jurisdictions is not conferred by the present Constitution.

Courts of equity will not interfere to control the proceedings of other courts where there have been mere errors of law or judgment, or where the matter is cognizable in the inferior court, and has been there decided, or even where there is concurrent jurisdiction.

The district court will not interfere to correct by injunction errors of an inferior court, even where no appeal is allowed. *Railway v. Dowe*, 70 T. 1; *Id.* 70 T. 5.

A contractor of a railway issued a number of time checks to his employés, which were endorsed by the payees in blank and assigned. Thirty of them became the property of the defendant. The larger portion of them were less than twenty dollars. The railway, in a petition for injunction, alleged, among other things, that the holder had brought separate suits on similar claims; that it was liable on none of them; that the justice of the peace refused to consolidate those suits, and gave judgment against the road, and the holder of the thirty checks threatened to bring in the same court separate suits on each check. A consolidation of the suits, if brought in the justice's court, would involve a claim exceeding the magistrate's court jurisdiction; *held*, that the petition disclosing that the defendant was about to avail himself of his right to bring separate suits in order to vex and harass the plaintiff by a multiplicity of suits to which the petition showed a perfect defense, against which suits there was no adequate protection, except by injunction—an injunction to restrain the holder from bringing separate suits on each check—the proper remedy. *Railway v. Dowe*, 70 T. 5.

#### ART. 2881. The bond for injunction.

(2.) When an injunction is sued out against the sale of personal property seized in execution, some of which is subject to execution, the measure of damages upon dissolving the injunction is the value of the property subject to execution.

The defendant, upon an injunction suit upon proper pleadings in reconvention and proof, may recover his damages for the wrongful suing out of the injunction, without service of citation upon the sureties upon the injunction bond.

[*Sharp v. Schmidt*, 62 T. 263, followed.] *Coates v. Caldwell*, 71 T. 19.

#### ART. 2891. Dissolution in term time or vacation.

(3.) All the cases agree that when the dissolution is granted because of the want of equity in the petition, and the injunction is the sole object of the suit, if plaintiff declines to amend, the case should be dismissed. [*Hale v. McComas*, 59 T. 484; *Corsicana v. White*, 57 T. 382; *Gaskins v. Peebles*, 44 T. 390; *Pryor v. Emerson*, 22 T. 162; *Cook v. De LaGarza*, 13 T. 431; *Baldrige v. Cook*, 27 T. 565; *Gibson v. Moore*, 22 T. 611.] The decisions are equally uniform, that when the injunction is dissolved by reason of a sworn denial of the facts stated in the pe-

tion, the suit should be continued for a hearing on the merits, if plaintiff demand or indicate his wish that this should be done. [Washington County v. Shultz, 63 T. 32; Floyd v. Turner, 23 T. 292; Horton v. Jones, Dallam, 456; L. & H. Blum v. Schram & Co., 58 T. 524.]

In a suit by injunction, when the temporary injunction has been dissolved on the filing of an answer swearing away the equities of the bill, the plaintiff is entitled to a trial upon the merits, unless the right is expressly waived; and it is error to dismiss, though the plaintiff make no request for a trial on the merits. [Pullen v. Baker, 41 T. 419; Fulgham v. Chevallier, 10 T. 549; Burnley v. Cook, 13 T. 586; Dearborn v. Phillips, 21 T. 449; Texas Land Co. v. Turman, 53 T. 623.] Roe v. Dailey, 1 U. C. 247.

[Gaskins v. Peebles, 44 T. 390; Sims v. Redding, 20 T. 386; Lively v. Bristow, 12 T. 60; Clegg v. Darragh, 63 T. 357; Baldrige v. Cook, 27 T. 565, overruled, and the distinction laid down in Texas Land Co. v. Turman not recognized.] Love v. Powell, 67 T. 15.

When an injunction is dissolved by final judgment, and an appeal is prosecuted by the giving a *supersedeas* bond by the party seeking the injunction, the dissolution is suspended—the injunction is continued in force by the appeal, and the supreme court will enforce obedience to its mandates until it reverses them.

The rule laid down in Williams v. Pouns, 48 T. 141, to the effect that on an appeal from a final judgment dissolving an injunction suspends the dissolution pending the appeal adhered to. Since that decision the Revised Statutes, substantially re-enacting the former laws regarding appeals, have been adopted, and it must be presumed they were adopted in view of the judicial construction they had received.

The case of Ewing v. Glidwell, 3 Howard, Miss., 332, which holds, in effect, that if a plaintiff takes a non-suit, or dismisses his case, he cannot so appeal as to confer jurisdiction upon the higher court, reviewed and disapproved. [The cases of Kempland v. McCauley, 4 T. R. 436, and Box v. Bennett, 1 H. Bl. 432, cited in support of that decision, reviewed and distinguished.]

[United States v. Evans, 5 Cranch, 105, and Houston v. Berry, 3 T. 235, reviewed.]

[Brewster v. The State of Connecticut, 9 Ohio, 189, cited and approved.] G. C. & S. F. Ry. v. F. W. & N. O. Ry., 68 T. 98.

If the order granting an injunction limits its duration to the hearing of the cause in the district court, and, on hearing the injunction, is dissolved, the order of dissolution is not suspended by an appeal. Fort Worth Ry. Co. v. Rosedale Ry., 68 T. 163.

#### ART. 2898. Principles of equity applicable.

(1.) While a judgment rendered before a justice of the peace cannot be revised in the district court, yet it would seem, under former decisions of the supreme court, that in a suit brought in the district court by the former defendant in a justice's court, to prevent by injunction the collection of the judgment there rendered against him on the ground of fraud, and because the judgment was dormant, the district court would have power to inquire whether the sum for which the judgment was rendered was still due, and if so, to render a judgment against the plaintiff in the injunction suit for the amount.

In such a proceeding, when it is shown that the judgment has not been paid, the injunction should be dissolved. The only ground for not issuing execution on a dormant judgment being the legal presumption of its payment, when this presumption ceases, to perpetuate the injunction would be in effect to violate a rule which denies the writ, unless irreparable injury would result from its being refused. Seymour v. Hill, 67 T. 385.

## TITLE 52.—INJURIES RESULTING IN DEATH, ACTIONS FOR.

**ART.**

2899. Actions for injuries resulting in death, brought when. *Annotated.*

2900. Character of wrongful act. *Annotated.*

2901 to 2903. See Civil Statutes.

**ART.**

2904. Who may bring the action. *Annotated.*

2905 to 2908. See Civil Statutes.

2909. Damages apportioned by jury. *Annotated.*

**ART. 2899. Action for injuries resulting in death, brought when.**

(1.) A right of action, given by the laws of another state, cannot be enforced by suit in a Texas court, when the right claimed is denied at common law, and is not secured by the Constitution or statutes of this state.

The statutes of Louisiana subrogate the child, on the death of the father, to such right as the father had to recover damages for an injury inflicted on him. No such right exists by virtue of a Texas statute, and such a cause of action did not survive the death of the parent at common law. A suit was brought in Texas by a child to recover such damages as the father could have recovered for injuries inflicted on him in Louisiana, had his death not resulted from the injury. *Held*, the action could not be maintained. *Railway Company v. Richards*, 68 T. 375.

A suit in this state by a widow for damages for the negligent killing of her husband in the State of Arkansas, will not be heard for want of jurisdiction.

Conceding the duty of comity, still, while the cause of action here alleged is good under the statutes of both states, the statutes of Arkansas are so different from the laws of Texas upon the subject that jurisdiction will not be taken. [*Willis v. Mo. P. Ry. Co.*, 61 T. 432; *T. & P. Ry. Co. v. Richards*, 68 T. 375, followed.] *Railway v. McCormick*, 71 T. 660.

(5.) The right of action declared by this article, for damages for the wrongful act, negligence, unskillfulness or default which causes the death of another, did not exist at common law; construing that section, *held*:

1. That the change of one subdivision of that section by the act of March 25th, 1887, did not operate to change the construction of another and independent clause as derived from the original context of the act.

2. In the first subdivision of the article the Legislature did not mean to apply the rule that the act of the agent is the act of the principal, and to make private persons responsible for the death of others when not caused by their own immediate act or omission.

3. That section was intended to impose greater liability upon carriers by making them responsible for the gross negligence of their agents, and to leave the liability of others for the acts of their agents as it existed at common law.

A sheriff, and the sureties on his official bond, are not liable under the provisions of this article in damages for the wrongful act of his deputy, who unlawfully kills another, who, having been arrested, was, when killed, attempting to make his escape. This held without deciding the question whether the homicide was under article 4521 of the Revised Statutes an "official act," for which the sheriff could be held responsible. *Hendrick v. Walton*, 69 T. 192.

[*Missouri Pacific Ry. Co. v. Scott*, Tyler term, 1886, and *Hendrick v. Walton*, 69 T. followed.] *Railway v. Hill*, 71 T. 451.

(6.) Under a contract with a railway company for the shipment of cattle, stipulating that the owner should send a hand upon the train charged with looking after the cattle, with a further stipulation that such employé of the owner of the cattle was an employé of the railway company, and that as such he assumed the risks of an employé. The hand in charge of the cattle was killed in a collision upon the train. Suit for damages by his widow, children and father. *Held*:

1. That the facts recited placed the hand in the employ of the owner of the cattle.

2. That the contractory recital did not alter the facts.

3. That, as a common carrier cannot limit its liability by express contract, it cannot be done upon false or counterfeited relations.

4. Such employé in charge of the cattle was a passenger for hire, and was entitled to the care due to any other passenger upon a freight train; and

5. The railroad company was liable for its own negligence, or the negligence of its servants, resulting in personal injury, and to his wife, children and father, if his death was caused by the gross negligence of the servants of the railroad company. *Railway v. Ivy*, 71 T. 409.

By contract it was stipulated that the "shipper, or his agent or agents in charge of the stock, should ride upon the freight train upon which the stock was being shipped." The shipper and one servant were upon the stock car. Objection was made to carrying both free. The shipper replied to the conductor that the employé could be put off. No further objection was made. The shipper was injured and on trial for damages it was not error to hold that he was a passenger upon the train, and to refuse a charge upon the contract that by its terms he was a trespasser by reason of his having an employé also upon the train. *Railway v. Aiken*, 71 T. 373.

It cannot be conceded to one incapable of protecting himself from the voluntary use of intoxicants, that by entering upon a train from which he is forbidden, and without the knowledge or consent of the conductor, that thereby he can impose upon the railway company any duty beyond ordinary care to protect him from injury while upon the train, and to leave him in a reasonably safe condition.

If intoxication, to the extent of insensibility, is chargeable as negligence when contributing to personal injury, it would follow that a less degree of, or partial, intoxication would not excuse or dispense with the duty of self-protection by proper care to avoid danger. *Railway v. Evans*, 71 T. 361.

#### ART. 2900. Character of wrongful act.

(1.) A railway company cannot evade liability to a plaintiff who was injured in its employment by the incompetency of another employé, by showing that the plaintiff, at the time of his injury, was not acting in the discharge of duties in the line of his employment, *provided* it was customary for the company's employes to do work for them other than the regular duty assigned them when ordered so to do by those placed over them, and that he was obeying such an order when he was injured. *Railway Co. v. Scott*, 68 T. 694.

A married woman cooking on a work-train, occupying a car, boarding work-hands in employ of a railway company, the company paying the board to the husband, and deducting same from their wages, is not a fellow-servant with the employes running the train. See case where ten thousand dollars not excessive damages. *Brown v. Sullivan*, 71 T. 471.

#### ART. 2904. Who may bring the action.

(1.) A stepfather may represent his wife's minor children as next friend, in a suit for damages for causing the death of their father. *Railway v. Kuehn*, 70 T. 582.

(2.) Construing articles 2903, 2904 and 2909 which give a right of action to the surviving wife, parents, husband and children of one whose death is caused by the negligence of the owner, servant or agent of a railway; *held*, all the surviving kindred related in the degrees designated in the statute, are necessary parties. If one thus related is not made a party, and the existence of such necessary party is made known to the court during the trial, it would seem to be the duty of the court to suspend the trial, and require such relative to be made a party. *Railway Company v. Culberson*, 68 T. 664.

In a suit by the widow and children of one alleged to have been killed by the negligence of a railway company, the fact that the deceased had instituted suit for damages resulting from the negligence before his death, is no bar to the action. Nor does the fact of the subsequent marriage of the surviving wife affect her right of action. *Railway v. Kuehn*, 70 T. 582.

The presumption will be indulged that the wife and children were properly made parties plaintiff to a suit instituted during the life of a deceased husband and father to recover damages for an injury inflicted on the wife, when the cause of action survives. *Fordyce v. Dixon*, 70 T. 694.

**ART. 2909. Damages apportioned by jury.**

(2.) In an action by parents to recover damages for the loss of the services of their child caused by the negligence of another, *held*:

1. When the killing of the child is wrongful, the parents are entitled at least to nominal damages.

2. When the testimony shows the bodily health and strength possessed by the child when it was killed, its sprightliness of mind or want of it, its aptitude or willingness to be useful in performing service, the manner in which its faculties were exercised, in useful labor or otherwise, and when, from its age and undeveloped state any estimate of value for its services, no particular knowledge in the way of expert testimony can be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value, then, upon such testimony, the sound discretion of the jury can be relied on to determine such value without any witness naming a sum.

[*Railroad v. Nixon*, 52 T. 24; *Railroad v. Cowser*, 57 T. 304; *Railroad v. Kindred*, 57 T. 508; *Potter v. Railroad*, 21 Wisc. 374; *City of Chicago v. Mayor*, 18 Ill. 359; *City of Chicago v. Hesing*, and *Railroad v. Becker*, 84 Ill. 486, reviewed.]

Juries are required by the organic law of the state and the courts cannot presume that they are composed of other than intelligent men, nor will the supreme court call that an error of instruction which to the court is intelligent and right. *Brunswick v. White*, 70 T. 504.

## TITLE 53.—INSURANCE.

## CH. 1.—INCORPORATION OF INSURANCE COMPANIES.

ART.

2910 to 2915. See Civil Statutes.

2916. Capital stock shall consist of  
what. *Amendment.*

ART.

2917 to 2928. See Civil Statutes.

**ART. 2916. Stock shall consist of what.**

The capital stock of a company shall consist:

1. In lawful money of the United States; or
2. In the bonds of this state or any county or incorporated town or city thereof, or the stock of any national bank; or
3. In first mortgages upon unincumbered real estate in this state the title to which is valid and the market value of which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company, and the policy, or policies, transferred to the company taking such mortgage. [Amendment April 8; July 6, 1889; 21 Leg. p. 11.]

## CH. 2.—COMMISSIONER OF INSURANCE.

ARTS. 2929 to 2942a. See Civil Statutes.

## CH. 3.—GENERAL PROVISIONS.

ART.

2943 to 2948. See Civil Statutes.

2948a. Life and accident insurance  
companies licensed to do bus-  
iness, when. *New.*

ART.

2949 to 2960. See Civil Statutes.

2970. Law applicable to policies. *An-  
notated.*

2971, 2971a. See Civil Statutes.

**ART. 2948a, §1. Life and accident insurance companies licensed to do business, when.**

Companies or associations organized under the laws of any other state of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, and having cash assets of a sum not less than one hundred thousand dollars, invested as required by the laws of this state regulating other insurance companies, shall be licensed by the commissioner of insurance to do business in this state, and be subject only to the provisions of this act; *provided, however,* that such company or association shall first file with the commissioner of insurance a certified copy of its charter, a written agreement appointing the commissioner of insurance and his successor in office to be its true and

lawful attorney, upon whom all lawful process in any action or proceeding against it may be served; a certificate under oath of its president and secretary that it is paying and for the twelve months next preceding has paid the maximum amount named in its policies or certificates in full; a statement under oath of its president and secretary of its business for the year ending December 31st preceding; a certified copy of its constitution and by-laws, and a copy of its policy and application; a certificate from the proper authority in its home state that said company or association is legally entitled to do business in such home state, and has at least one hundred thousand dollars surplus assets subject to its indebtedness. It shall be the duty of the commissioner of insurance to issue a license to any company or association complying with the provisions of this act, and every such company or association shall annually thereafter, before such license is renewed, file with the commissioner of insurance, on or before the first day of March, a statement, under oath of its president and secretary, or like officers, of its business for the year ending December 31st preceding.

§2. FEES PAYABLE BY FOREIGN COMPANIES. Every such company or association shall pay to the commissioner of insurance, for the use of the state, the following fees: For filing copy of its charter, twenty-five dollars; for filing statement preliminary to admission, twenty dollars; for filing each annual statement after admission, twenty dollars; for license to company or association, one dollar.

§3. MUTUAL BENEFIT ORGANIZATIONS NOT WITHIN THE FOREGOING PROVISIONS. The provisions of this act shall in no wise apply to mutual benefit organizations doing business in this state through lodges or councils, such as the order of Chosen Friends, Knights of Honor, or kindred organizations. [Act April 3; July 6, 1889; 21 Leg. p. 98.]

ART. 2970. Law applicable to policies.

(1.) The holder of a policy of insurance, who has an opportunity to inspect it before he accepts it, is chargeable with knowledge of its contents, in the absence of fraud, misrepresentation or concealment.

A plea which seeks to avoid the effect of a restriction in a policy on the authority of the insurance company's agent, upon the ground that the policy was cunningly and ingeniously devised, and the restriction was so hidden away in masses of fine print that they were illegible and unintelligible, and was designed to defraud, is bad on special exception. *Morrison v. Insurance Co.*, 69 T. 353.

A contract may be consummated by letter deposited in the post office; and when an offer is made contemplating an acceptance in this manner, and a letter accepting is properly mailed, the agreement is complete; but to be properly mailed, the letter should be duly posted, and the date of the posting must determine the date of the contract. *Blake v. Insurance Co.*, 67 T. 160.

(2.) An assignment of a fire insurance policy, after a loss has occurred, will not vitiate the policy. [Wood on Ins., 559, 575; *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287.] *Merchants' Ins. Co. v. Scott*, 1 U. C. 534.

(5.) An insurance company that stipulates in a policy that it will only be bound by writing to any future contract in regard thereto, does not preclude itself from making a parol contract to change that stipulation; and if through its

general agent the stipulation is disregarded, and the company fails to repudiate his act, when good conscience requires that if it be disaffirmed it should be done promptly, the company will be bound. *Morrison v. Insurance Co.*, 69 T. 353.

An insurance company is chargeable with knowledge of the acts of its general agent, and when the company fails to promptly repudiate the act of such an agent, it will be held to have ratified such act by silence, when, if repudiation was intended, it was its duty to speak through its constituted authority. *Morrison v. Insurance Co.*, 69 T. 353.

(7a.) In order to constitute a statement or promise of the insured a warranty, it must be made a part of the policy, either by appearing in the body of the instrument, or by a proper reference in the policy to some other paper in which it is found. Being in the nature of a condition precedent, it must form part of the contract between the parties.

When a doubt as to whether such other paper was regarded by the insurer and insured as a part of the policy, the doubt will be resolved by the courts in favor of the insured.

The following clause appeared on a piece of paper, different from that on which the policy of insurance to which it was attached was printed, and was attached by mucilage to a blank space on the face of the policy: "It is understood and agreed that the assured shall keep a set of books, showing a record of his or their business, including all purchases and sales both for cash and on credit, as well as a copy of his or their last inventory, warranted to be kept in an iron safe at night." The place on the policy where the clause was thus posted was in the midst of a sentence on the face of the policy, with which it had no proper connection, and which purported to contain the promises entered into by the insurance company, and not those made by the insured. The existence of the clause was not known to the insured. In a suit upon the policy in which it appeared that the stipulations regarding the iron safe were not observed, their being no evidence of fraud committed by the insured or of resulting injury to the insurer from a failure to keep the safe. *Held*:

1. The clause could at most be regarded as a representation, and not as a clause of warranty.

2. The method of attaching the clause to the policy, precluded it from being invested with any higher dignity than a mere representation.

3. Words purporting to be a condition on which a policy is issued, must be set forth in such a place and in such a manner in the policy as to leave no doubt that they were so intended, and words inserted promiscuously therein, having no connection with the other conditions of the policy, although the word *condition* is used, will not be treated as a condition of the policy, citing, *Kingly v. New England Mutual Fire Insurance Company*, 8 Cushing, 393.

4. When a policy of insurance is in its terms inconsistent, or ambiguous in its provisions, it must be construed most favorably for the assured. *Goddard v. Insurance Co.*, 67 T. 69.

(8.) Where there is a proviso that, if the risk is increased, the policy is void, it is error for the court to instruct the jury that "if the defendant, by its agents, acting within the scope of their authority, had actual knowledge, notice or reasonable information of the plaintiff having permitted the erection of the ten-pin alley in proximity to the store, and if with such knowledge and information they made no objection thereto, but continued knowingly to earn and receive the premium as if the policy were still in full force, or by the conduct of its agents, acting within the scope of their authority, the defendant induced the plaintiff to believe that the said erection of the ten-pin alley did not, in their view, materially increase the risk or avoid the policy, then the defendant would be estopped and precluded from setting up the avoidance of the policy by reason thereof." If building the ten-pin alley increased the risk it rendered the policy void, and mere silence on the part of the company, failure to give notice, make objection, or return any part of the premium will not constitute a waiver of the forfeiture occasioned by the increased risk. [*Texas Banking and Insurance Co. v. Hutchins*, 53 T. 61; *Banking Co. v. Stone*, 49 T. 13; *Insurance Co. v. Lacroix*, 45 T. 170; *N. Y. Central Ins. Co. v. Watson*, 23 Mich. 486; *Hoyet v. Gilman*, 8 Mass. 339; *Hendricks v. Commercial Ins. Co.*, 8 Johns. 1; *Waters v. Allen*, 5 Hill, 424; 94 Mass. 160.] *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.



(16.) Where there are no words of reference to the application in the policy it forms no part thereof. If the insurer desires to make it so, he must refer to it, and cannot claim that it is by implication to be treated as a part of the policy. [7 *Lans.* N. Y., 452.]

An untrue or fraudulent statement on the part of the assured, in his application for the policy of insurance, of a fact material to the risk, does not avoid the policy when either the company or its agent was informed of and knew the real facts at the time when the contract was made and the premium paid. [*Wood on Fire Ins.*, 277.] *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

(17.) A policy of insurance which, by its terms, is to become void if the property insured shall be sold or transferred, or if the interest of the assured be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, is not avoided by a deed subsequently made by the assured to another for the sole purpose of enabling the owner, through him, to negotiate a loan which was never effected, and which was not intended by either party to convey title. *Insurance Company v. Gordon*, 68 T. 141.

The surviving husband, having possession of the community property of himself and deceased wife, with the right of disposition of it for the payment of his own debts, and in the settlement of his business has an insurable interest therein, and representing himself the owner of it, in taking out a policy of insurance thereon, was not such a misrepresentation of ownership as would vitiate the policy. [*Jones v. Jones*, 15 T. 148; *Flanders on Insurance*, 281; *Wood on Ins.*, 297, 414.] *Merchants' Ins. Co. v. Dwyer*, 1 U. C. 441.

A transfer of a policy of insurance as collateral security to one who already holds a mortgage on the insured premises, though made with the consent of the insurer, if there be no agreement on the part of the mortgagee to pay the premiums on the policy, or to perform any of the obligations originally assumed by the insured, or other consideration, will not prevent the policy from becoming void by a subsequent sale of the property made by the mortgagor without consent of the insurer, when, by the terms of the policy, it was to become void if such sale be made without such consent.

This case distinguished from the authorities referred to, in *May on Insurance*, as supporting the doctrine announced in section 276 of that work, and *Hale v. Insurance Company*, 6 Gray, 169, approved.

By an assignment of a policy of insurance, with the consent of the insurer, the company is not regarded as yielding any of its rights as to the performance by the assured of all the conditions of the policy, and any violation by the assured of any of those conditions is fatal to a recovery by the assignee. The application of this principle is not affected by articles 266, 267, of the Revised Statutes. *Swenson v. Sun Fire Office*, 68 T. 461.

A surviving partner administering upon the estate of the deceased partner is not the sole unconditional owner of partnership assets.

Nor does such ownership exist when, or if the administrator and surviving partner should pay firm indebtedness to an amount equal to or greater than the value of the firm's assets. Such payment would give the right to reimbursement out of the assets, but would not confer complete ownership.

[*Crescent Insurance Company v. Camp*, 64 T. 521, followed.]

Where the state of ownership of insured property is made known to the agent of the insurance company at the time the policy was issued, the Insurance Company cannot set up the want of complete ownership to bar an action upon the policy. [*Ins. Co. v. Eads*, 65 T. 118.] *Insurance Co. v. Camp*, 71 T. 503.

(20.) Though a policy of insurance, upon its face, may provide that it shall not be valid unless countersigned by the company's general agent, who had power to issue and cancel policies, and make renewals and endorsements of other insurance, and also that the procuring of other insurance on the property, "not made known to the company and consented to hereon," will invalidate the policy, yet if other insurance was obtained with the verbal consent of such agent, who promised to endorse his consent on the policy, and again afterwards made written memoranda of a renewal, but not on the policy, and no objection was made by the company, the company would be bound, and the consent of the company to the subsequent insurance can be shown otherwise than by endorsement on the policy. *Morrison v. Insurance Co.*, 69 T. 353.

A policy of insurance stipulated that "agents of this company have no authority to bind the company in violation of any of the printed terms or conditions of insurance as herein expressed; and no printed or written restriction hereof, which by its terms may be subject to waiver, shall be deemed to have been waived, except by distinct, specific agreement, clearly expressed in the body of the policy." *Held*, that any condition in the policy which, under its terms might have been waived in the body thereof, and not otherwise, must be deemed within the meaning of the stipulation, a condition or restriction "subject to waiver," and to such only does the stipulation apply. *Morrison v. Ins. Co.*, 69 T. 353.

(24) Where by the terms of a policy of insurance it is stipulated as a condition precedent to a right of action by the insured that the amount of damage in case of injury or destruction by fire shall be appraised on demand of either party to the contract of insurance, and that the report of such appraisement, under oath, should be made a part of the proofs of loss and furnished to the insurer, no action can be maintained if the insured, on demand made for such appraisement, refuses to comply therewith, there being no fraud, accident or mistake.

When the policy stipulates that such appraisement shall be made a part of the proofs of loss, and that the loss shall not be payable until after such proofs are furnished, the appraisement and proofs of loss are conditions precedent to the right to recover on the policy.

An acceptance by the local agent of the insurer of the inventory of lost goods, without objection, his inspection and partial adjustment of the loss, and his offer to pay a sum certain in satisfaction of the claim for damage, will not constitute a waiver of the proof of loss required by the policy, if such agent at the time notified the insured that he expected and required the proofs of loss stipulated for by the contract. *Insurance Co. v. Clancy*, 71 T. 5.

(25.) Where defective proofs have been made, a refusal to pay on special grounds, or a denial of liability, unless predicated upon the defects in the preliminary proofs, is a waiver of all defects therein, and estops the insurer from insisting upon them to defeat his liability. [*Wood on Ins.*, 718.] *Merchants' Ins. Co. v. Dwyer*, 1. U. C. 441.

The clause in a life insurance policy, "No suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time the right of action accrued," controls and limits the general laws of limitation, and suit cannot be maintained after the agreed limit of time.

The clause will apply also to minors who may be beneficiaries. The exceptions in the statutes in favor of minors do not affect the agreement. *Suggs v. Insurance Co.*, 71 T. 579.

(38.) A party having no insurable interest in the life of another cannot receive an assignment of a policy of insurance issued upon the life of the latter by the Supreme Lodge of the Knights of Honor upon an agreement merely to pay the premiums or assessments necessary to keep the policy in force. Such an assignment is in contravention of public policy, and the fact that the rules of the Supreme Lodge of the Knights of Honor may permit the transfer, cannot validate it. *Price v. Knights of Honor*, 68 T. 361.

On the face of a mutual benefit association certificate it appeared that the wife of a member whose name was mentioned in it as beneficiary, was not a party to the contract with her husband evidenced by it. It was subject to be surrendered by the laws of the association, which were, after its issuance, amended so as to permit a surrender of the certificate without the consent of the beneficiary. After the laws were thus changed the original benefit certificate was surrendered by the husband, and another issued instead to the husband, who, before his death, assigned the new certificate on full consideration, and without fraud in the assignment. *Held*:

1. That the wife was not thereby deprived of any legal right.

2. Her ignorance of the surrender of the original certificate, and failure to give her assent to its surrender, are immaterial.

The wife not being a party to the original contract, could not complain of the change of the laws of the association. *Byrne v. Casey et al.*, 70 T. 247.

The by-laws of the T. B. A. required that notice of its assessments shall be sent to each member, and that "any person who shall fall in arrears for dues or

Contributions, after thirty days' notice, shall cease to be in good standing, and shall forfeit all rights and claims to any and all benefits of the association." It was the custom of the officer charged with the duty to mail such notice to each member. *Held*, that a reasonable construction of the by-laws required that notice be in fact given to a member before a forfeiture would result from a failure to pay dues, etc., and that mailing to a member through the post office was not such notice.

The rules and principles applicable to ordinary insurance companies apply to mutual benefit associations, such as the T. B. A.

An act or promise of an officer superintending the business of a mutual benefit association, although beyond his power as defined in the by-laws of the association, if acted upon by a member, will bind the company.

See facts held to estop the T. B. A. from denying the privileges of membership to one who was claimed to have forfeited his membership. *McCorkle v. Ins. Association*, 71 T. 149.

The sale of property insured will not invalidate the policy thereon, if the insured at the time of the loss still had an insurable interest therein as a lien for unpaid purchase money, or otherwise holds such relation to the property that its destruction by the peril insured against involves pecuniary loss to him. [*West v. The Citizens' Ins. Co.*, 27 Ohio St. 1; *Jackson v. Palmer*, 52 T. 427; *Jackson v. Etna Ins. Co.*, 16 B. Mon. (Ky.), 242; *Wood on Ins.* 481; *Oliver v. Green*, 3 Mass. 133; *May on Ins.*, 76.] *Merchants' Ins. Co. v. Scott*, 1 U. C. 534.

(39.) When a policy of insurance contains a stipulation that all fraud or attempt at fraud, by false swearing or otherwise, shall bar any recovery for loss under it, no recovery can be enforced by an assignee of the policy, though the assignment was made with the consent of the insurer, if it was transferred to defraud creditors, and the insurer was ignorant of fraudulent purpose when consent to the transfer was obtained; and this though the transfer was made to the agent of the insured, he acting for himself. In such a case the creditor of the insured cannot enforce collection of the policy by process of garnishment. *Insurance Co. v. Willis & Bro.*, 70 T. 12.

## TITLE 54.—INTEREST.

## ART.

2972. Definition of interest. *Annotated.*  
2973 to 2975. See Civil Statutes.

2976. Eight per cent. allowed when no rate is fixed by the parties. *Annotated.*

2977. Eight per cent. on open account. *Annotated.*

## ART.

2978. Twelve per cent. may be agreed to. *Annotated.*

2979. Usurious contract void for the interest. *Annotated.*

2980, 2981. See Civil Statutes.

## ART. 2972. Definition of interest.

(1.) In a suit to recover damages for the wrongful seizure and conversion of plaintiff's goods, under attachment, the measure of actual damages is the value of the goods, with eight per cent. interest by way of damages from the date of their unlawful seizure. *Willis & Bro. v. Whitsitt*, 67 T. 673.

(4.) On a contract to pay a designated sum, and in addition thereto other installments, but not as interest, the mere fact that such installments aggregate a sum equal to twelve per cent. on the main debt, will not authorize them to be computed in a judgment as interest. *Labbe v. Corbett*, 69 T. 503.

## ART. 2976. Eight per cent. when no rate is fixed.

(4.) Interest is the creature of the statute, and unknown to the common law, and the statute does not appear to embrace legacies. An executrix will be chargeable with interest from the time when, in the prudent management of the estate, and in view of its debts and condition, and after demand made upon her, she can pay it without risk. Interest cannot be demanded until it is clearly shown that the executrix is in default. [*Adriance v. Brooks*, 13 T. 281; *Davis v. Thorn*, 6 T. 286; *Roper on Legacies*, 1245; *Williams on Executors*, 1153.] *Hawkins v. Forrest*, 1 U. C. 167.

In a suit against an administrator he may save interest by tendering into court the money remaining in his hands; but if he resists the proceedings of one entitled thereto, it is proper to charge him with interest from the time the money should have been paid over, or demand made. *Simpson v. Knox*, 1 U. C. 569.

## ART. 2977. Eight per cent. on open account.

(3.) The printed heading to an account of goods sold contained the following words and figures:

Terms } 30 days discount 5 per cent.  
Cash } 10 " " 6 " "

*Held*, in the absence of evidence to the contrary, that the price for the goods sold was due on delivery, yet, if the money was paid in thirty days, a discount of five per cent., and if paid in ten days, a discount of six per cent. would be allowed to the debtor. *Moss v. Katz & Mayer*, 69 T. 411.

## ART. 2978. Twelve per cent. may be agreed to.

(4.) On breach of a written contract by the obligee, which by its terms stipulates for twelve per cent. interest on deferred payments for specific articles contracted for and to be delivered to such obligee under it, when there is a partial delivery only, and the obligor recovers judgment, he is entitled to the contract price of the articles delivered and the conventional interest of twelve per cent. specified in the contract. The breach does not entitle the defendant to claim a reduction of the interest to the amount allowed by the statute when no interest is specified by the contracting parties. *Parks v. O'Connor*, 70 T. 377.

## ART. 2979. Usurious contract void for the interest.

(1.) The fact that the agent of a money lender exacted and received from the borrower, for his own benefit, a sum of money when a loan was negotiated, which loan was to be repaid with the highest rate of interest allowed by law, will not render the contract usurious if the sum was exacted without the knowledge of the lender.

In a suit on a promissory note, a plea of usury, based on the allegation that the borrower paid to the agent of the lender, for negotiating the loan of a sum, which, added to the interest stipulated for in the note, would exceed the interest

which might lawfully be charged, and which fails to charge that the sum exacted was demanded and paid with the knowledge of the lender, is bad on demurrer. *Williams v. Bryan*, 68 T. 593.

(3.) When partial payment is made to a national bank under a contract to pay usurious interest, in the absence of a stipulation as to how the payment shall be appropriated, the law will apply it in liquidation of that portion of the contract which is legal, and the bank may afterwards avoid the penalty fixed by act of Congress for collecting usurious interest by relinquishing claim for it. If, however, a partial payment on the debt is, by agreement between the bank and the debtor, appropriated to the payment of usurious interest, the *locus penitentiae* cannot exist, since the offense has been consummated and the right to recover the penalty is fixed. *Stout et al. v. Bank*, 69 T. 384.

A settlement and release executed by a member of a co-partnership to a national bank which had collected usurious interest from the firm, recited: "We (the firm) do renounce and declare to be fully satisfied any and all rights, rights of action, claim or demand, that we may have or be entitled to under any law of the United States, to recover any sum of money from said Ennis National Bank, by reason of us having paid heretofore to said bank any interest at a greater rate than twelve per cent. per annum," *held*:

1. The release, though it may have been made with fraudulent intent as to the other partners, was binding on the firm when accepted by the bank in ignorance of such fraudulent intent.

2. [*Farnival v. Weston*, 7 Moore, 356, and *Arton v. Booth*, 4 Moore, 171, cited.] *Stout et al. v. Bank*, 69 T. 384.

(11.) Interest cannot be charged upon a premium on a loan made by a building and loan association to a member thereof, since this would be a charge not on what the member received, but upon what he relinquished to the association. [To this extent the cases of *Association v. Gallagher*, 25 Ohio State, 208; *Society v. Taylor*, 41 Maryland, 409; *Association v. Blackburn*, 48 Iowa, 385; *Gordon v. Association*, 12 Bush, 110, and *Martin v. Association*, 2 Coldwell, 418, approved.]

A member of a building and loan association, who owned five shares, of one hundred dollars each, desiring a loan, bid upon her stock a premium of fifty-seven per cent. and received in cash forty-three per cent. She thus received from the association the two hundred and fifteen dollars, and executed her obligation for five hundred dollars at six per cent. interest. The five hundred dollars bore interest at six per cent. per annum, to be paid in monthly installments of one-half per cent. She further agreed to pay one dollar per month on each share of stock, and all fines and other charges that might be assessed against her as a member of the association. The stock was transferred as collateral security, and a deed of trust given on land to secure payment, *held*:

1. Since the contract was for a loan of two hundred and fifteen dollars, and required the borrower to pay more than twelve per cent. for the use of the money, she having agreed to pay six per cent. on the five hundred dollars, it was in violation of the statute, usurious and void as to the whole amount of interest.

2. The association was not a partnership, and the decisions regarding advancements made to a partner out of a common fund in which he has an equal interest, have no application.

3. The vice in the contract was not cured by an entry made by the association after foreclosure sale, of a credit to the borrower of a sufficient sum to reduce the interest to twelve per cent. per annum. The entry was in itself evidence that the lender was a conscious violator of the law.

4. On a proper statement of accounts, the association being in debt to the borrower, the sale of her property under the deed of trust was void, and the purchaser acquired no title. *Jackson v. Cassidy*, 68 T. 283.

## TITLE 55.—IRRIGATION.

### CH. 1.—REGULATING THE MODE OF IRRIGATION.

ARTS. 2982 to 2988. See Civil Statutes.

### CH. 2.—LAND GRANTS TO IRRIGATION CANALS AND DITCHES.

ARTS. 2989 to 3000. See Civil Statutes.

### CH. 3.—PROVIDING FOR THE ACQUISITION OF WATER, ENCOURAGING IRRIGATION, ETC.

#### ART. 3000a. (*New.*)

- §1. Unappropriated running water may be diverted from its channels.
- §2. Public streams appropriated for irrigation, how.
- §3. Appropriation ceases, when.
- §4. Priority of right includes what.
- §5. Appropriation of water, how made.
- §6. Construction of ditch, etc., commenced and prosecuted, how.
- §7. Completion defined.
- §8. Compliance with preceding provisions relates back.
- §9. Use of appropriated waters by subsequent appropriators.

#### ART. 3000a. (*New.*)

- §10. Irrigation corporations, formed how; rights of adjoining land owners.
- §11. Right of way granted over public lands; may be acquired over private lands.
- §12. Sale of water, made how; subject to regulations established by law.
- §13. Ditches may cross roads; bridges to be maintained at crossings.
- §14. Persons injuring canals, etc., guilty of a misdemeanor.
- §15. Corporation for irrigation may acquire land.
- §16. Conflicting laws repealed.

**ART. 3000a, §1. Unappropriated running water may be diverted from its channel.**

The unappropriated waters of every river or natural stream within the arid portions of the State of Texas, in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes, may be diverted from its natural channel for irrigation, domestic, and other beneficial uses; *provided*, that said water shall not be diverted so as to deprive any person who claims, owns, or holds a possessory right or title to any land lying along the bank or margin of any river or natural stream of the use of the water thereof for his own domestic use.

#### **§2. Public streams appropriated for irrigation, how.**

That the unappropriated waters of every river or natural stream within the arid portions of the state, as described in the preceding section of this act, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes as hereinafter provided.

**§3. Appropriation ceases, when.**

The appropriation must be for the purposes named in this act, and when the appropriator, or his successor in interest, ceases to use it for such purpose the right ceases.

**§4. Priority of right includes what.**

As between appropriators, the one first in time is the one first in right to such quantity of the water only as is reasonably sufficient and necessary to irrigate the land susceptible of irrigation on either side of ditch or canal.

**§5. Appropriation of water, how made.**

Every person, corporation, or association of persons which have constructed or may hereafter construct any ditch, canal, or reservoir, for the purposes named in this act, and taking water from any natural stream, shall, within ninety days after this act goes into effect, or within ninety days after the commencement of such construction, file and cause to be recorded in the office of the county clerk of the county where the head gate of such ditch or canal may be situated, or to which said county may be attached for judicial purposes, in a well bound book to be kept by said clerk for that purpose, a sworn statement in writing, showing the name of such ditch or canal, the point at which the head gate thereof is situated, the size of the ditch or canal in width and depth, and the carrying capacity thereof in cubic feet per second of time, the name of said stream from which said water is taken, the time when the work was commenced, and the name of the owners or owner thereof, together with a map showing the route of said ditch or canal.

**§6. Construction of ditch, etc., commenced and prosecuted, how.**

Within ninety days next after the filing of said statement, the party claiming the right to appropriate the water shall begin the actual construction of the proposed ditch, canal, or reservoir, and shall prosecute the work thereon diligently and continuously to completion.

**§7. "Completion" defined.**

"Completion," as used in the preceding section, is hereby defined to be the conducting of the water in the main canal to the place of intended use.

**§8. Compliance with preceding provisions relates back.**

By compliance with the preceding provisions of this act the claimant's right to the use of the water relates back to the time when the work of excavation or construction was commenced on said proposed ditch, canal, or reservoir; *provided*, that a failure to file said statement shall in no wise work a forfeiture of such heretofore acquired rights, nor prevent such claimants of such heretofore acquired rights from establishing such rights in the courts.

**§9. Use of appropriated waters by subsequent appropriators.**

When any person, corporation, or association of persons, by compliance with the preceding provisions of this act, shall become entitled to the use of the waters in any river or stream, it shall thereafter be unlawful for any other person, corporation, or association of persons, except for domestic use by any one entitled thereto, to so divert the flow of water in said river or stream in such manner and to the extent of depriving said person, corporation, or association of persons in priority of the use of the water to which they may be so entitled.

**§10. Irrigation corporations formed, how; rights of adjoining land owners.**

Corporations may be formed and chartered under the provisions of this act and of the general incorporation laws of the State of Texas, for the purpose of constructing, maintaining, and operating canals, ditches, flumes, feeders, laterals, reservoirs and wells, and of conducting, transferring, and furnishing water to all persons entitled to the same, for irrigation and domestic uses, and for the purpose of building storage reservoirs for the collection and storage of water for the uses before mentioned, and for mining, milling, and stockraising. All persons who own or hold a possessory right or title to land adjoining or contiguous to any canal, ditch, flume or lateral, constructed and maintained under the provisions of this act, and who shall have secured a right to the use of water in said canal, ditch, flume, or lateral, shall be entitled to be supplied from such canal, ditch, flume, or lateral with water for the irrigation of such land and domestic uses; *provided*, the party so entitled shall first make available his said land for agricultural or grazing purposes, and shall provide cisterns, wells, or storage reservoirs for water for domestic purposes.

**§11. Right-of-way granted over public lands; may be acquired over private lands.**

All corporations and associations formed for the purposes of irrigation as provided in this act, are hereby granted the right-of-way, not to exceed one hundred feet in width, over all public, university, school, and asylum lands of the state, with the use of the rock, gravel, and timber on the right-of-way, for construction purposes, and may obtain the right-of-way over private lands by contract. Any such corporation may also obtain the right-of-way over private lands by condemnation by causing the damages for any private property appropriated by such corporations or associations to be assessed and paid for as provided in cases of railroads.



**§12. Sale of water, made how; subject to regulations established by law.**

All surplus water not used or disposed of, as provided for in the preceding sections of this act, shall be conducted back to the stream from which it was taken. And all water sold or disposed of may be measured in inches, feet, or fractional portion of the whole supply, or distributed by the hour or acre system. But any person, corporation, or association of persons shall furnish water in the way and manner named in the contract or certificate issued to the purchasers of said water, so long as water remains unsold in the ditch; *provided*, that the commissioner of agriculture, insurance, statistics, and history shall make a report to the Legislature at its next regular session, and at each regular session thereafter, as to the cost and expense attending the construction and maintenance of canals, ditches, flumes, feeders, and wells for irrigation in various parts of the state, and accompany the same with a statement of the charges made for the uses of water by canal, ditch, and well companies, and the Legislature shall, at such times as it deems proper, either by direct legislation or by the creation of a commissioner or water inspector or inspectors with full delegated power, control and regulate the quantity of water which may be diverted by any water company or individual, when and in the manner in which it may be diverted, and may establish and enforce all such reasonable rules and regulations necessary and proper governing and controlling such corporations and water construction companies and persons operating under the provisions of this act, and may also control, regulate, change and fix the charges for the use of water made by such ditch, canal and well companies.

**§13. Ditches, etc., may cross roads; bridges to be maintained at crossings.**

All said persons, corporations and associations shall have the right to run along or across all roads and highways necessary in the construction of their work, and shall at all such crossings construct and maintain necessary bridges for the accommodation of the public, and shall not affect or impair the usefulness or condition of said road or highway.

**§14. Person injuring canal, etc., guilty of a misdemeanor.**

Any person who shall willfully, or through gross negligence, injure any irrigating canal or its appurtenances, wells, or reservoirs, or who shall waste the water thereof, or shall take the water therefrom without authority, shall be deemed guilty of a misdemeanor, and for each offense shall be liable to a fine not exceeding five hundred dollars.

**§15. Corporation for irrigation may acquire land.**

Any corporation created and organized under the provisions of the general laws of this state or the provisions of this act for the purpose of irrigation, shall have the power to acquire lands by voluntary donation or purchase, or in payment of stock or water rights, and to hold and dispose of all such lands and other property, and to borrow money for the construction, maintenance and operation of its canals, ditches, flumes, feeders, reservoirs and wells, and may issue bonds and mortgage its corporate property and franchises to secure the payment of any debt contracted for the same; *provided*, all lands acquired by said corporation, except such as are used for the construction, maintenance and operation of said canals, ditches, laterals, feeders, reservoirs and wells shall be alienated within twenty years from the date of acquiring said lands or be subject to judicial forfeiture.

**§16. Conflicting laws repealed.**

All laws and parts of laws in conflict with the provisions of this act are hereby repealed. [Act March 19; July 6, 1889; 21 Leg. p. 100.]

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**TITLE 56.—JAILS.**

**ARTS. 3003 to 3006. See Civil Statutes.**

## TITLE 57.—JURIES IN CIVIL CASES.

### CH. 1.—JURORS, THEIR QUALIFICATIONS AND EXEMPTIONS.

**ART.**

3009 to 3011. See Civil Statutes.

3012. Jurors disqualified to try a particular case. *Annotated.*

**ART.**

3013 to 3016. See Civil Statutes.

**ART. 3012. Jurors disqualified to try a particular case.**

(1.) The fact that a person *subpoenaed* as a witness was received as a juror is not error when he did not testify on the trial. *Railway v. Brinker*, 68 T. 500.

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### CH. 2.—JURY COMMISSIONERS FOR THE DISTRICT COURT, ETC.

**ARTS. 3017 to 3026.** See Civil Statutes.

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### CH. 3.—JURY COMMISSIONERS FOR THE COUNTY COURT, ETC.

**ARTS. 3027 to 3029.** See Civil Statutes.

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### CH. 4.—PROCEEDINGS OF THE JURY COMMISSIONERS, ETC.

**ARTS. 3030 to 3045.** See Civil Statutes.

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### CH. 5.—SELECTED JURORS, HOW SUMMONED, ETC.

**ARTS. 3046 to 3050.** See Civil Statutes.

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### CH. 6.—JURIES FOR THE WEEK, HOW MADE UP.

**ARTS. 3051 to 3058.** See Civil Statutes.

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### CH. 7.—JURY TRIALS AUTHORIZED, WHEN AND HOW.

**ART.**

3059. See Civil Statutes.

3060. Must be demanded and jury fee be paid. *Annotated.*

**ART.**

3061 to 3073. See Civil Statutes.

**ART. 3060. Must be demanded and jury fee be paid.**

(4.) The failure to pay the jury fee on the first day of the term does not forfeit the right to a jury when such failure does not operate to the prejudice of the opposite party.

A party demanded a jury on the first day of the term, paid the fee on the second day, the case was called on the third day of the term, the jury cases on the civil docket were set for the second week of the term. *Held*, error to disregard the demand for a jury and proceed to try the cause. *Allen v. Plummer*, 71 T. 546.

## CH. 8.—CHALLENGES.

ART.  
3074 to 3079. See Civil Statutes.  
3080. Challenge for cause. *Annotated*.

ART.  
3081 to 3087. See Civil Statutes.

### ART. 3080. Challenge for cause.

(2.) Construing articles 3080 and 3011, Revised Statutes, *held*, that the trial court may allow the challenge of a juror for cause on other grounds than those which the statute declares shall render him disqualified in the particular case. This power is discretionary, and when exercised it will not be reversed, unless it has resulted in preventing a fair and impartial trial. *Couts v. Neer*, 70 T. 468.

A juror, whose wife's sister is the wife of a plaintiff to a suit at the time of trial, may, in an action by such plaintiff for the recovery of damages for personal injuries, be challenged for cause. The damages, when recovered, would be community property of the plaintiff and his wife, and she, though not a nominal party, would be substantially a party to the suit. *Railway v. Horne*, 69 T. 643.

(3.) In examining a juror on his *voir dire*, it is not improper to ask him if he knows anything about the facts of the case, or if he has made up his mind about the case. The examination need not be confined to the literal language of the statute, but may extend to an inquiry as to the bias or prejudice relating to the subject matter of the litigation as well as to that which may be felt toward the parties personally. A refusal to allow such examination touching the qualification of a juror affords cause for a reversal. *Railway v. Terrell*, 69 T. 650.

## CH. 9.—FORMATION OF THE JURY FOR THE TRIAL OF A CAUSE.

ART.  
3088 to 3090. See Civil Statutes.  
3091. Where names of full jury not found in the box. *Annotated*.

ART.  
3092. Challenge for cause to be made, when. *Annotated*.  
3093 to 3097. See Civil Statutes.

### ART. 3091. Where names of full jury not found in the box.

(1.) Construing articles 3091, 3093 and 3094, Revised Statutes, *held*, that the object of the statute was, as far as practicable, to secure the formation of a jury from the names selected by the jury commissioners, and to prevent delay in the formation of a jury. If when a jury is to be impanelled, as many as twelve names remain of the panel for the week, no talesman should be summoned until such challenges for cause as are desired have been made. If, after challenge for cause, as many as twelve remain in the jury box, both parties must then proceed to make their peremptory challenges. Whenever the number is less than twelve, either when first drawn or after challenges for cause, or after peremptory challenges, then, and not before, the court may order others to be summoned by the sheriff. *Railway v. Greenlee*, 70 T. 553.

### ART. 3092. Challenge for cause to be made, when.

(1.) Construing articles 3089 and 3094, Revised Statutes, *held*, it is contemplated by the statutes that the challenge of jurors for cause should be made after their names are drawn by the clerk and the jury lists delivered to the parties, but this may be waived by counsel. If, before the delivery of the list, an exception

be taken to the questions propounded to test the qualification of a juror, it cannot be objected on appeal that the examination was conducted at an improper time, when no such objection was urged before. *Railway v. Terrell*, 69 T. 650.

(2.) The supreme court will not consider, on exceptions, whether a juror, whom the appellant was compelled to challenge peremptorily, was disqualified under the statute and should have been excused from sitting for cause, when the record fails to reveal that the appellant had exhausted his challenges before the jury was complete. *Railway v. Terrell*, 69 T. 650.

## CH. 10.—OATH OF JURORS IN CIVIL CASES.

ARTS. 3098, 3099. See Civil Statutes.

## CH. 11.—JURIES, HOW CONSTITUTED, AND THEIR VERDICTS.

ART.

3100. See Civil Statutes.

3101. Death or inability of jurors pending trial. *Annotated*.

ART.

3102, 3103. See Civil Statutes.

ART. 3101. Death or inability of jurors pending trial.

(2.) When a juror is excused from service by counsel for both parties after the trial has begun, and a verdict is rendered by the remaining eleven, it is not necessary that all should sign it. *Lumber Co. v. Hancock*, 70 T. 312.

## CH. 12.—COMPENSATION OF JURORS, ETC.

ARTS. 3104 to 3106. See Civil Statutes.

## TITLE 58.—LANDLORD AND TENANT.

## ART.

3107. Landlords shall have preference lien. *Annotated.*

3108. Tenant not to remove property subject to lien. *Annotated.*

3109. When lien expires. *Annotated.*

3110 to 3114. See Civil Statutes.

3115. Duty of officer. *Annotated.*

## ART.

3116 to 3119. See Civil Statutes.

3120. Petition. *Annotated.*

3121, 3122. See Civil Statutes.

3122a. Owners of residences, store-houses, etc., have preference lien, etc. *Amendment and annotated.*

## ART. 3107. Landlords shall have preference lien.

(5.) Whether the produce to which the landlord's lien attaches is sold under order of court to enforce that lien, or by the landlord or tenant, the rights of a subsequent lien holder attach only to what shall remain after the landlord's lien is satisfied. If the junior lien holder, by his declarations of a purpose not to look to his lien to enforce payment of his debt, induces the landlord and tenant to disregard his lien in the sale of the crop, he is thereby estopped from setting up claim that the landlord or tenant having possession shall appropriate any part of the proceeds to the payment of his debt. *Chapman v. McLemore*, 68 T. 654.

(6.) Where a tenant's cotton has been levied on under execution, his landlord cannot recover under his lien for rent, in the statutory proceeding of trial of right of property. While his lien is superior to all other creditors, it does not give him title to the property, but only the right to have it subjected to the payment of his debt. [*Perkins v. Sterne*, 23 T. 532; *Duty v. Graham*, 12 T. 432; *Buchanan v. Monroe*, 22 T. 541; *Wright v. Henderson*, 12 T. 44; *Blacks.*, book 2, p. 317; *Acts* 14th Leg. p. 55; *Ewing v. Perry*, 35 T. 778; *Matthews v. Burke*, 32 T. 432; *Townsend v. Isenberger*, 45 Ia. 670; *Alwood v. Ruckman*, 21 Ill. 200; *Woodruff v. Adams*, 5 Blackf., 318; *Dixon v. Niccols*, 39 Ill. 372; *Cloud v. State*, 53 Miss. 664; *Westmoreland v. Wooten*, 51 Miss. 825.] *Pace v. Sparks*, 1 U. C. 402.

(7.) The landlord's lien provided for in articles 3107, 3122 and 3122b, Revised Statutes, exists by force of the statute, independent of any levy of compulsory process, and attaches to any property owned by the tenant and placed in a storehouse or other building rented, so long as the tenant continues his occupancy, and for one month thereafter, except as to such property as may be relieved from the operation of such lien by the terms of the law. *Marsalis v. Pitman*, 68 T. 624.

## ART. 3108. Tenant not to remove property subject to lien.

(2.) The landlord's lien for advances to make a crop attaches by virtue of the statute to the crop raised by the tenant, which lien is superior to any other that can be given so long as the landlord's lien remains in force. Until that lien is satisfied the tenant cannot remove the crop made by him from the premises without subjecting it to attachment, nor can any other lien holder affect the landlord's lien by removing it.

The lien attaches to the entire crop, and a subsequent lien holder who has removed the crop from the rented premises without the landlord's consent, and who has purchased it at forced sale, under proceedings foreclosing such junior lien, cannot protect himself in its appropriation by showing that the tenant still had on the premises other property subject to the landlord's lien sufficient to satisfy it. The landlord's lien attaches to the entire crop, and cannot be extinguished as to any part of it by its unauthorized removal from the rented premises.

The doctrine which permits a marshaling of securities for the benefit of a junior mortgagee, has no application to a case where the junior lien has its origin in an act which is discountenanced by the statute, or where the senior lien holder would be inconvenienced or delayed in the collection of his debt. *Wilkes v. Adler*, 68 T. 689.

## ART. 3109. When lien expires.

(1.) A landlord obtained a distress warrant for rent. The constable to whose hands the writ came, without instructions, levied upon household furniture of the tenant exempt from levy. The property was sold under the proceedings in

absence of any testimony showing knowledge or ratification of the seizure of the exempt property on part of the landlord. *Acld.* (1) it is presumed the landlord intended that no action should be taken under the writ not authorized by law, and (2) that in absence of proof of ratification of the illegal levy he is not liable in damages for the seizure of the exempt property. *White v. Stribling*, 71 T. 108.

**ART. 3115. Duty of officer.**

(1.) A sub-tenant, in the absence of a stipulation to the contrary, is not liable to the landlord for rent, unless he becomes assignee of the term, in which event he becomes liable on all the covenants of the original lease. *Giddings v. Felker*, 70 T. 176.

**ART. 3120. Petition filed on or before appearance day.**

(2.) Filing the petition at the return term of the distress warrant, before motion to dismiss or action taken by the court, is, in a suit for rents, a sufficient appearance to give the court jurisdiction. *Maynard v. Lockett*, 1 U. C. 527.

**ART. 3122a. Owners of residences, storehouses, etc., have preference lien.**

All persons leasing or renting any residence, storehouse, or other building, shall have a preference lien upon all the property of the tenant in such residence, storehouse, or other building, for the payment of the rents due and that may become due; *provided*, the lien for rents to become due shall not continue or be enforced for a longer period than the current contract year, it being intended by the term "current contract year" to embrace a period of twelve months, reckoning from the beginning of the lease or rental contract, whether the same be in the first or any other year of such lease or rental contract. Such lien shall continue and be in force so long as the tenant shall occupy the rented premises, and for one month thereafter; but this article shall not be construed as in any manner repealing or affecting any act exempting property from forced sale; *provided*, that the provisions of this act shall not apply to nor in any manner affect any existing contracts for rent, nor to any action or suit now pending upon any such contract. [Amendment March 28; July 6, 1889; 21 Leg. p. 11.]

(1.) A tenant holding over leased premises after the expiration of his written lease, which fixed the amount of rent, is only bound to pay reasonable value for the premises for the time he holds over, without regard to the rent fixed in the lease contract; and on the trial of a suit for rents it is error to exclude evidence offered by the defendant to show a rescission or setting aside of the written lease. *Maynard v. Lockett*, 1 U. C. 527.

(7.) In an action for the consideration for an assignment of a lease for a term of years an eviction by the landlord for non-payment of rent would in no way operate as a defense. It is not a recovery under a title different and paramount from that held by the tenant. *Howard v. Britton & Co.*, 71 T. 286.

(10.) There is no implied warranty on the part of a landlord that a building is adapted to the purposes for which it is leased. *Lynch v. Ortleb et al.*, 70 T. 727.

## TITLE 59.—LAWS.

### CH. 1.—GENERAL PROVISIONS.

**ARTS. 3123 to 3127a.** See Civil Statutes.

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### CH. 2.—COMMON LAW.

**ARTS. 3128, 3129.** See Civil Statutes.

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### CH. 3.—SPECIAL LAWS.

**ARTS. 3130 to 3137.** See Civil Statutes.

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### CH. 4.—CONSTRUCTION OF LAWS.

**ARTS. 3138 to 3140.** See Civil Statutes.

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## TITLE 60.—LEGISLATURE.

### CH. 1.—TIME OF MEETING.

**ART. 3141.** See Civil Statutes.

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### CH. 2.—ORGANIZATION.

**ARTS. 3142 to 3152.** See Civil Statutes.

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## TITLE 61.—LIENS.

## CH. 1.—JUDGMENT LIENS.

## ART.

3153, 3154. See Civil Statutes.

3155. Abstract shall show what. *Annotated.*

3156 to 3158. See Civil Statutes.

## ART.

3159. Lien of judgment, fixed when. *Annotated.*3160. Lien exists, how long. *Annotated.*

3161 to 3163. See Civil Statutes.

## ART. 3155. Abstract shall show what.

(1.) The registration of the abstract of a judgment, which does not substantially describe the judgment, gives no notice, and fixes no lien. Thus, a judgment which was rendered as a judgment in favor of Joan Burkhead and William Burkhead, against W. T. and J. C. Roberts, fixed no lien for a judgment rendered in a cause in which Joan Bankhead and William Bankhead were plaintiffs, and W. T. Roberts and J. C. Roberts were defendants. *Anthony v. Taylor*, 68 T. 403.

## ART. 3159. Lien of judgment fixed, when.

(1.) The registry of an abstract of a judgment, as well as the index thereof, is necessary to secure a lien. No presumption arises from evidence that the abstract of the judgment was recorded that the index thereof has been made. *Miller v. Koertge*, 70 T. 162.

The lien given to a judgment after its registration and index is statutory, and cannot exist without a compliance with the terms of the statute. Unless the abstract of the judgment is indexed in the manner pointed out by the statute, no lien exists. *Nye v. Moody*, 70 T. 434.

The failure to index the abstract of a judgment, filed for the purpose of securing a lien, is fatal to the lien. If the certificate of the clerk fails to show that it was indexed, the presumption that he discharged his duties will not be sufficient to supply the omission. *Nye v. Gible*, 70 T. 458.

Construing articles 3157, 3158, 3159 and 4299, Revised Statutes, held, that while under the general registration laws instruments that are required to be recorded will be deemed, if properly authenticated, to have been recorded from the date of their filing for record with the proper officer, a different rule was clearly intended by the Legislature to apply to the registry of abstracts of judgments; the latter will not for any purpose be regarded as recorded until they are recorded in fact, and no judgment lien attaches by virtue thereof before such actual registration. *Belbaze v. Ratto*, 69 T. 636.

(2.) A lien will not be given by registering the abstract of a judgment after the judgment lien became dormant by failure to issue an execution within twelve months after its rendition. *Anthony v. Taylor*, 68 T. 408.

The registration, July 17th, 1868, in another county of a judgment upon which execution had not been issued within twelve months after its rendition, in a case not affected by the stay laws, did not fix a lien in the county of such registration. *Clements v. Ewing*, 71 T. 370.

(3.) A lien acquired by the registration of a judgment is not vacated by an appeal and *supersedens* which suspends the enforcement of the judgment. *Thulemeyer v. Jones*, 37 T. 560; *Smith v. Kale*, 32 T. 290.

A judgment lien attaches to land subsequently acquired. *Barron v. Thompson*, 54 T. 235.

## ART. 3160. Lien exists, how long.

(1.) Under the act of November 9th, 1866, the judgment lien was lost, unless executions were regularly issued, and a break of over twelve months between executions abated the lien. [54 T. 243, 370 and 56 T. 250.] *Wylie v. Posey*, 71 T. 34.

A creditor claiming a mere statutory lien by the record of a judgment, or the levy of an execution against the husband, in whom the apparent title is vested, cannot be protected by reason of such lien against a resulting trust in favor of the wife, though he have no notice, at the time, of the execution of such a trust, and the purchaser of such property at a subsequent execution sale will take nothing as against the wife's equity, if he had notice of the same before making the purchase. *Yoe & Harris v. Montgomery*, 68 T. 333.

## CH. 2.—MECHANICS, CONTRACTORS, BUILDERS AND MATERIAL MEN.

ART.	ART.
3164. Mechanics and others entitled to a lien. <i>New and annotated.</i>	3174. Lien upon the homestead secured, how. <i>New.</i>
3165. Time when contract or account shall be filed. <i>New and annotated.</i>	3175. Notice of claims must be given to owner, when. <i>New and annotated.</i>
3166. Lien secured, how; effect of. <i>New.</i>	3176. See Civil Statutes.
3167. Form of affidavit where there is no written contract. <i>New and annotated.</i>	3177. Liability of owner fixed by notice. <i>New.</i>
3168. Form of affidavit where material is furnished to a contractor. <i>New.</i>	3178. Proceedings when lien is filed by a person other than the contractor. <i>New.</i>
3169. Description of improvement shall accompany the contract. <i>New.</i>	3178a. Indebtedness deemed to accrue, when. <i>New.</i>
3170. Lien secured, when, and its extent. <i>New.</i>	3179. All liens shall be paid <i>pro rata</i> . <i>New.</i>
3171. Priority of liens. <i>New.</i>	3179, §1. Lien ceases, unless suit is brought within twelve months. <i>New.</i>
3172. Purchaser of improvements placed in possession. <i>New.</i>	§2. Satisfaction of lien shall be recorded, when. <i>New.</i>
3173. Sale must be on judgment foreclosing lien. <i>New.</i>	§3. Conflicting laws repealed. <i>New.</i>
	3179a. See Civil Statutes.

### ART. 3164. Mechanics and others entitled to a lien.

Any person or firm, lumber dealers, artisan, laborer, mechanic, or subcontractor, who may labor or furnish material, machinery, fixtures, or tools to erect any house or improvement, or to repair any building or improvement whatever, under or by virtue of contract with the owner or his agent, trustee, contractor, or contractors, upon complying with the provisions of this act, shall have a lien on such house, building, fixtures, or improvements, and shall also have a lien on the lot or lots of land necessarily connected therewith to secure payment for labor done, lumber, material, machinery, or fixtures, and tools furnished for construction or repair. [Act April 5; July 6, 1889, §1; 21 Leg. p. 110.]

(3.) When materials are furnished under a single contract for buildings to be erected on two or more contiguous lots owned by the person contracting for them to be supplied, the lien attaches to all the lots. If the owner omitted to make separate contracts for the improvement of each lot, he cannot be heard to say that a lien does not attach to all the lots for all the material used. *Lyon & Gribble v. Logan*, 68 T. 521.

The lien of a mechanic for material furnished, who procures the material for the construction of a building, cannot be defeated by reason of its delivery in accordance with the wish of the owner of the house at some other place than where the house is being erected. After such material is prepared for the building, though it be not delivered on the ground, that fact will not defeat the lien for its value, if the mechanic, being ready to deliver at the building, is prevented by the owner of the improvement, who violates his contract and refuses to receive it.

The lien of a mechanic, though not fixed before registry of the contract or bill of particulars, yet when it is fixed relates back to the time when the work was performed or the material furnished, and takes precedence of all claims on the property being improved, which have been fastened on it since that time.

A party who permits without objection a witness to testify who has not been sworn, thereby waives all objection to his evidence based on the failure to swear him. *Trammell & Co. v. Mount*, 68 T. 210.

(4.) In foreclosing a mechanic's lien, when the original owner of the house and a purchaser under attachment levied after the mechanic's lien was fixed, are both made defendants, the decree should direct that whatever remains from the proceeds of sale, after satisfying the mechanic's lien, should be paid to the purchaser under attachment. *Trammell & Co. v. Mount*, 68 T. 210.

**ART. 3165. Time when contract or account shall be filed.**

In order to fix and secure the lien herein provided for, it shall be the duty of every original contractor, within four months, and every journeyman, day laborer, or other person seeking to obtain the benefits of the provisions of this act, within thirty days after the indebtedness shall have accrued, to file his or their contract in the office of the county clerk of the county in which such property is situated, and cause the same to be recorded in a book to be kept by the county clerk for that purpose; *provided*, that if such journeyman, day laborer, or other person have no written contract, it shall be sufficient for them to file an itemized account of their claim, supported by affidavit, showing that the account is just and correct, and that all just and lawful offsets, payments, and credits known to the affiant have been allowed. [Act April 5; July 6, 1889, §2; 21 Leg. p. 110.]

(2.) The fact that the registration of a contract or bill of particulars, with its accompanying statement necessary to fix a mechanic's lien, is made in a book also used by the clerk to record bills of sale, will not affect the validity of the record, if the book is also used for the purpose of recording all mechanic's liens. *Lyon & Gribble v. Logan*, 68 T. 521.

**ART. 3166. Lien secured, how; effect of.**

Any person or firm who may furnish any material to any contractor, to be used in the erection of any house, building, or improvement, or to repair any house, building, or improvement, by giving written notice to the owner of such house, building, or improvement, or his agent or representative, of each and every item as it is furnished, and by showing how much there is due and unpaid on each bill of lumber furnished by said lumberman or material man under said contract, at any time within ninety days after the indebtedness shall have accrued, fix and secure the lien provided for in this act as to the material furnished at the time or subsequent to the giving of the written notice above provided for, by filing in the office of the county clerk of the county in which such property is situated, an itemized account of his or their claim, as provided in this section, and cause the same to be recorded in a book kept by the county clerk for that purpose; *provided*, that any lien fixed and secured under this section shall attach to the house, building, or improvements, and also to the lot or lots on which said building or buildings are situated; *provided*, that in no case shall the owner be compelled to pay a greater sum for or on account of labor

performed or material, machinery, fixtures, and tools furnished, as provided in this act, than the price or sum stipulated in the original contract between such owner and the original contractor or builder for such house, building, fixtures, improvements, or repairs. [Act April 5; July 6, 1889, §3; 21 Leg. p. 110.]

**ART. 3167. Form of affidavit where there is no written contract.**

If there be no written contract it shall be the duty of the person seeking to obtain the benefits of this act, to deliver to the clerk of the county court a sworn account as provided for in sections two and three, to be filed and recorded as therein provided, and in such case, when the labor is performed for or the material is furnished to the owner of the building or improvement, the following form may be used and will be sufficient to fix the lien contemplated by this act:

THE STATE OF TEXAS, }

.....COUNTY. } A. B., affiant, makes oath and says: That the annexed is a true and correct account of the labor performed (or material furnished) C. D., of.....county, Texas, and that the prices thereof as set forth in said account hereto annexed are just and reasonable and the same is unpaid; that said labor was performed (or material furnished, or both) for said C. D., at the time in said account mentioned, under and by virtue of a contract between affiant and C. D., and that due notice was given by affiant of the labor performed or material furnished, in accordance with section 3; and affiant further makes oath and says that he is informed and believes that C. D. was, at the time said contract was made and entered into and said labor was performed (or material furnished), the owner of the house or improvements described as follows: (Here describe the house or improvement.) And that said house (or improvement) is situated upon a certain lot or tract of land which affiant is informed is owned by said C. D., and which is described as follows: (Here describe the lot or tract of land.) And this affiant claims a lien upon said house (or improvements) and upon said land; *provided, however*, a substantial compliance with the above form shall be deemed sufficient. [Act April 5; July 6, 1889, §4; 21 Leg. p. 110.]

(2.) The registration of a bill of particulars of material furnished for the construction of a house, filed for record and recorded in the office of the clerk of the county court, to which is appended a statement embracing a description of the lots on which the house was erected, is not invalidated because the description also embraced other ground on which no building was done. The fact that a lien is claimed on more land than it can lawfully cover, cannot vitiate it in its application to so much of the land described as the lien may properly apply to, unless the claim is intentionally or fraudulently made, or would in some way operate to the injury of the owner or third persons. *Lyon & Gribble v. Logan*, 68 T. 521.

**ART. 3168. Form of affidavit where material, etc., is furnished to a contractor.**

If the labor performed for or the material is furnished to a contractor or builder, and not to the owner of the property, then the following form shall be deemed sufficient to fix the lien provided for by this act:

THE STATE OF TEXAS, }

.....COUNTY. } A. B., affiant, makes oath and says: That the annexed is a true and correct account of the labor performed for (or material furnished to) C. D., a contractor (or builder), by affiant (or other person), and the prices thereof as set forth in the annexed account are just and reasonable, and the same is unpaid (or the sum of.....dollars, as shown by said account, unpaid), after allowing all just and lawful offsets, payments, and credits known to affiant; that said labor was performed (or material furnished, or both) for or to said C. D., to be used in the erection of a house (or building or improvement, or in repairing of a house, building, or improvement) owned, as affiant is informed and believes, by E. F., of.....county, State of Texas, and that said labor was performed (or material furnished, or both) to or for said C. D., under and by virtue of a contract between affiant (or other party) and said C. D. (And in case of material furnished, affiant shall further swear that he has given to the owner, his agent, or representative, notice in writing of each item of said account, as required in section 3, as the same was furnished to said C. D.); *provided, however*, that a substantial compliance with the above form shall be deemed sufficient to fix and secure the lien. [Act April 5; July 6, 1889, §5; 21 Leg. p. 110.]

**ART. 3169. Description of improvement shall accompany the contract.**

In case the contract is filed and recorded as provided for in the second section of this act, a like description of the house, building, or improvement, and the lot or tract of land shall accompany the same as is required in the foregoing forms, except that the same is not required to be under oath. [Act April 5; July 6, 1889, §6; 21 Leg. p. 110.]

**ART. 3170. Lien secured when, and its extent.**

When the contract or account is filed and recorded as required by the preceding sections of this act, it shall be deemed sufficient diligence to fix and secure this lien. If this lien is against land in a city, town, or village, it shall extend to or include the lot or lots upon which such house, building, or improvement is situated, or upon which such labor was performed; and if the lien is against land in the country, it shall extend to and include fifty acres upon

which such house, building, or improvement is situated, or upon which such labor has been performed. [Act April 5; July 6, 1889, §7; 21 Leg. p. 110.]

**ART. 3171. Priority of liens.**

The lien herein provided for shall attach to the houses, buildings, or improvements for which they were furnished, or the work was done in preference to any prior lien or incumbrance, or mortgage upon the land upon which houses, buildings, or improvements have been put or labor performed, and the person enforcing the same may have such house, building, or improvement sold separately; *provided*, any lien, incumbrance, or mortgage on the land or improvement at the time of the inception of the lien herein provided for, shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for. [Act April 5; July 6, 1889, §8; 21 Leg. p. 110.]

**ART. 3172. Purchaser of improvements, etc., placed in possession.**

When the house, building, or improvements are sold separately, the officer making the sale shall place the purchaser in possession thereof, and such purchaser shall have the right to remove the same within a reasonable time from the date of the purchase. [Act April 5; July 6, 1889, §9; 21 Leg. p. 110.]

**ART. 3173. Sale must be on judgment foreclosing lien.**

Every sale must be upon judgment rendered by some court of competent jurisdiction, foreclosing such lien and ordering sale of such property. [Act April 5; July 6, 1889, §10; 21 Leg. p. 110.]

**ART. 3174. Liens upon the homestead secured, how.**

When material is furnished, labor performed, erections or repairs made upon a homestead, if the owner thereof is a married man, then to fix and secure the lien upon the same, it shall be necessary for the person or persons who furnished the material or performed the labor, before such material is furnished or labor is performed, to make and enter into a contract in writing, setting forth the terms thereof, which shall be signed by the owner and his wife, and privily acknowledged by her, as is required in making sale of homestead. And such contract shall be recorded in the office of the county clerk in the county where such homestead is situated, in a well bound book to be kept for that purpose; *provided*, when such contract has been made and entered into by the husband and wife and the contractor or builder, and the same has been recorded as heretofore provided, then the same shall inure to the benefit of any and all persons who shall furnish material or labor thereon for such contractor or builder. [Act April 5; July 6, 1889, §11; 21 Leg. p. 110.]

**ART. 3175. Notice of claims must be given to owner, when.**

Every person, except the original contractor or builder, or those claiming under the third section of this act, who may wish to avail himself of the benefits of this act, shall give at least ten days' notice in writing before the filing of the lien, as herein required, to the owner or owners, or agent, or either of them, that he holds a claim against such house, building, or improvement, setting forth the amount, and from whom the same is due; and thereafter said owner or owners, or agent, shall be authorized to retain in his hands the amount claimed until the same is settled or determined not to be owing. [Act April 5; July 6, 1889, §12; 21 Leg. p. 110.]

(1.) Under the law as it existed in 1884, a sub-contractor or material man could only stop the payment of whatever money due, or to become due, upon a building contract which might remain under the control of the owner of the house; and the statutory notice only stopped payment of such balance, and the proceedings affected the property only so far as was requisite to secure payment of the fund affected by the notice.

Verbal notice to the owner of a house that the contractor who constructed it had verbally transferred to a material man an amount of the contract price sufficient to meet such claims, withdrew that amount, if due, from the further control of the owner of the house. *Clark v. Gillespie*, 70 T. 513.

**ART. 3177. Liability of owner fixed by notice.**

A compliance with the provisions of the preceding section shall be deemed sufficient diligence to fix the liability of the owner of such house, building, or improvement for the payment of such demand, subject to the subsequent provisions of this act. [Act April 5; July 6, 1889, §13; 21 Leg. p. 110.]

**ART. 3178. Proceedings when lien is filed by a person other than the contractor.**

In all cases when a lien shall be filed under a provision of this act, by any person other than the original contractor or builder, it shall be the duty of the original contractor to defend any action brought thereupon, at his own expense, and during the pending of such action the owner may withhold from the contractor or builder the amount of money for which such lien shall be filed, and in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of said judgment and costs, and if he shall have settled with the contractor or builder in full, he shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor or builder was originally the party liable. But no owner or proprietor shall in any case be required to pay, nor his property be liable for any money that he may have paid to the contractor before the fixing of the lien or before he has received written notice of the existence of the debt, and all sub-contractors, laborers, and material men shall have preference over other creditors of the principal contractor or builder; *provided further, a*

copy of each bill of lumber furnished to the contractor or builder, as the same is furnished, shall be delivered to the owner of said homestead, said bill specifying each item so furnished, how much is paid thereon, and what is due for lumber or material furnished for said contract prior thereto; *provided*, when the debt is paid under the contract for such building, or improvements, the party for whose interest the contract was recorded shall enter a relinquishment showing a full compliance of said contract to the extent of all money due them from the original contractor or builder on account of labor done or material furnished, and the money due said original contractor or builder from the person owning or having improvements made shall not be garnisheed by other creditors to the prejudice of such sub-contractors, mechanics, laborers, or material men. [Act April 5; July 6, 1889, §14; 21 Leg. p. 110.]

**ART. 3178a. Indebtedness deemed to accrue, when.**

When labor is performed by the day or week, then the indebtedness shall be deemed to have accrued at the end of each week during which labor is performed. When material is furnished the indebtedness shall be deemed to have accrued at the date of the last delivery of such material, unless there is an agreement to pay for such material at a specified time. [Act April 5; July 6, 1889, §15; 21 Leg. p. 110.]

**ART. 3179. All liens shall be paid pro rata.**

The liens for work and labor done or material furnished, as provided in this act, shall be upon an equal footing, without reference to date of filing the account or lien, and in all cases when a sale shall be ordered and the property sold, which may be described in any account or lien, and the proceeds arising from such sale, if not sufficient to discharge all the liens against the same, without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens; *provided*, such accounts or liens shall have been filed and suit brought as provided by this act; *provided*, that nothing in this act shall be so construed as in any manner affecting the contract between said owner and original contractor as to the amount, manner, or time of payment of said contract price. [Act April 5; July 6, 1889, §16; 21 Leg. p. 110.]

**ART. 3179, §1. Lien ceases unless suit is brought within twelve months.**

The lien created by this act shall cease to be operative after twelve months after the same is fixed, unless suit is brought within said time to enforce such lien. [Act April 5; July 6, 1889, §17; 21 Leg. p. 110.]

**ART. 3179, §2. Satisfaction of lien shall be recorded, when.**

All parties who are authorized under this act to file a lien, and have done so, and had such lien recorded, shall, when such lien is



paid or satisfied, or have received their proper lienable parts for which the owner of the building would be liable under this act, shall record a relinquishment and satisfaction of such lien. [Act April 5; July 6, 1889, §18; 21 Leg. p. 110.]

**ART. 3179, §3. Conflicting laws repealed.**

All laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed. [Act April 5; July 6, 1889, §19; 21 Leg. p. 110.]

### CH. 3.—LIENS ON DOMESTIC VESSELS.

**ARTS. 3180, 3181.** See Civil Statutes.

### CH. 4.—OTHER LIENS.

**ART.**

3182. See Civil Statutes.

3183. Lien of livery stable keepers. *Annotated.*

3184 to 3189. See Civil Statutes.

3190. Other liens and contracts not affected. *Annotated.*

3190a. Reservations of title must be recorded, when. *Annotated.*

3190b. Instruments intended to operate as liens. *Annotated.*

§1. Mortgages on personal property must be recorded. *Annotated.*

§2. Indorsements on instruments. *Annotated.*

§§3, 4. See Civil Statutes.

**ART.**

3190b. §5. Entry of satisfaction made, how. *Annotated.*

§§6 to 8. See Civil Statutes.

§9. General principles applicable to liens and mortgages. *Annotated.*

3190c. §1. Owner or keeper of stallion, etc., entitled to a lien on progeny. *New.*

§2. Lien may be enforced, when. *New.*

§3. Lien secured, how. *New.*

§4. Lien under verbal contract secured, how. *New.*

§5. Contract shall contain description of mother of progeny. *New.*

**ART. 3183. Of livery stable keepers.**

(1.) The lien in favor of proprietors of livery stables, upon all animals placed with them for feed, care and attention, does not attach when the animal is placed in the stable by one not the owner, and whose possession of the animal, or whose agency to control the same, is unauthorized. *Stott v. Scott*, 68 T. 302.

**ART. 3190. Other liens and contracts not affected.**

(1.) A certified copy of the record of a chattel mortgage is secondary evidence, and incompetent in absence of testimony to the loss or destruction of the original.

Section 3. of act April 22d. 1879 (2 Sayles' Rev. Stats., art. 3190b, sec. 3), provides that a copy of a chattel mortgage, duly filed for registration, certified to by the clerk in whose office it has been filed, "shall be received in evidence of the fact that such instrument \* \* \* was received and filed according to the indorsement of the clerk thereon, but of no other facts." Such copy has no other statutory efficiency. *Boydston v. Morris*, 71 T. 697

**ART. 3190a. Reservations of title must be recorded, when.**

(2.) One who does business in his own name, in replenishing from time to time by purchasing and in selling in the usual course of trade a stock of goods, under such circumstances as to induce others dealing with him to regard him as the real owner, must as to creditors and purchasers be regarded as the real owner. [This case distinguished from *Tufts v. Bank*, 63 T. 113.]

A secret contract, by which one who is the apparent owner of a stock of goods and merchandising in his own name is to pay for them to the former owner in installments of three-fourths of the gross receipts from sales at stated periods, to replenish by purchase, from time to time, the title to the original stock, and to that bought to replenish, to remain in such former owner until the original debt is paid, can only be regarded as to purchasers and creditors without notice as a device for the perpetration of fraud. *Publishing Company v. Johnson*, 68 T. 273.

When the owner of personal property transfers its possession to one who executes his notes to pay for it an agreed price, at a stipulated time, under a contemporaneous contract, by the terms of which the title is to remain with the vendor until the price is paid, with the right to reclaim possession if the price is not paid at the time agreed on, the original owner in default of payment may elect either to enforce payment of the notes, or to reclaim possession. The assertion of either right is the abandonment of the other. To resume possession cancels the right to enforce payment of the obligation to pay, and an effort to enforce payment is equivalent to an admission of title in the purchaser.

The effect of the transfer of such written promise to pay, is to assign to the indorsers of the obligation the right to enforce collection, and to deprive the original vendor of the right to reclaim possession in default of payment. This right, thus lost, cannot be restored without the consent of the indorser, by an agreement between the original parties to the transaction. *Bank v. Thomas & Sons*, 69 T. 237.

Movable property which is attached to realty, and which is capable of being removed without being itself destroyed and without detriment to the freehold, is generally called a fixture. Further than this, the use of the term has never been satisfactorily settled. Some authorities confine it to such personalty as has been attached to the realty in such manner as to become a part of it. While, perhaps, an equal number apply the word to such only as remains personalty, although annexed to the freehold. [See *Abbott's Law Dictionary*, word "Fixture."] Using the word, however, in its more general sense, whether a fixture is to be deemed real or personal property, depends in many cases upon the circumstances which may reasonably be presumed to manifest the intention of the parties concerned in its annexation to the realty. [*Moody v. Aiken* 50 T. 65; *Hutchins v. Masterson*, 46 T. 551.] When the owner of land attaches personal property to it as a permanent accession to the value of the freehold, it becomes a part of the realty. A tenant, upon the other hand, who, with the consent of his landlord, annexes chattels to the land in such manner that they can be removed without damage to the realty, does not thereby part with his property in them, but may remove them at or before the termination of his lease. So if one agrees to sell to another personal property, and deliver it, retaining the title until the purchase be paid, and the vendee obtain his consent and move it upon and attach it to the vendee's realty, it will, in our opinion, remain personalty, as between the parties to that transaction. So if the mortgager in possession, by agreement with the mortgagee, annex a mortgaged chattel to his own land, the mortgagee's rights are not affected, and he may still treat it as personal property. [*Tiffs v. Horton*, 53 N. Y. 377; *Eans v. Estes*, 10 Kan. 314; *Tibbetts v. Moore*, 23 Cal. 208; *Cullers & Henry v. James*, 66 T. 494.] *Harkey v. Cain*, 69 T. 146.

One who purchases at a voluntary sale from his debtor, and pays no money, but credits the amount of the consideration on a pre-existing debt, is not a *bona fide* purchaser for value—following former adjudications.

The reason of this rule is, that the purchaser advances nothing on the faith of his purchase, and loses nothing if the apparent title of his vendor should prove worthless. Hence, an agreement to discharge a debt to a third party, for which the purchaser is already liable as guarantor, or to assume the payment of a debt to a third party without the knowledge or assent of such third party, or to pay off a mortgage already existing on other property of the purchaser which he would be compelled to pay off to protect his title, is within the reason of the rule.

[*Brothers v. Mundell*, 60 T. 240, and *Grace v. Wade*, 45 T. 527, reviewed.]

By the word *creditors*, as used in the act of February 5th. 1840, which protected creditors and purchasers without notice against prior unrecorded conveyances and mortgages of property, was meant creditors who had acquired some character of lien on the property. Such is still the law. Whilst the statute as to chattel mortgages differs from the act of 1840, in that it avoids these instruments as

against creditors, whether with or without notice, it makes no change as to the character of the debt; it be thus protected.

The language of the act of February 5th, 1840, and the act regarding chattel mortgages being the same, and the latter act having been passed since the decision in *Grace v. Wade*, relating to the same subject matter, the word *creditors*, as it occurs in the latter act, must be regarded as having the same meaning that was applied to it in construing the former act.

One who has not acquired a lien by process of law, on chattels claimed under a prior unrecorded mortgage, is not a creditor within the meaning of the statute regarding chattel mortgages, and is not entitled to protection as such. *Overstreet v. Manning et al.*, 67 T. 657.

In a proceeding for trial of the right of property, certain property was claimed by plaintiffs under a contract, in which they agreed to sell it to Bousset and Seisfield, upon condition that the latter should pay for them within a certain time, with the understanding that, until paid for, they, or their proceeds, if sold, should continue to be the property of the vendors. In pursuance of this agreement, Bousset & Seisfield executed to Thomas & Sons their promissory notes, falling due at the respective dates when the purchase money of the rakes was to be paid.

These notes were indorsed by the payees to W. S. Thomas & Bro., and by them to the Merchants' and Planters' banks for collection, and were by the latter duly protected for non-payment; and they were still unpaid at the trial of this cause. The claimants were still in possession of the notes, and exhibited them upon the trial, and it appeared that both indorsements had been erased. The judge, sitting without a jury, rendered judgment, upon the law and facts, for the claimants, and the bank has brought the case by appeal to this court. The relation of Thomas & Sons to the property, and its purchase money, are fixed by the contract and the notes which were subsequently executed.

By the terms of the contract Thomas & Sons reserved in themselves the title to the property transferred and the right to reclaim possession of it if the consideration remained unpaid, and they had also the alternative right to enforce the payment of the notes given for the purchase money. The right to reclaim that money was vested in Thomas & Sons alone, and was to be exercised in the event of a default in payment to them of the purchase money, or of a reasonable belief that such default was intended. The contract gave the vendors no power to part with the right to the purchase money, and at the same time to hold the title to the property, with the consequent power to rescind the contract. The assertion of one of these rights was, therefore, an abandonment of the other. To resume possession of the property was to cancel the debt for its purchase money; on the other hand, to enforce this debt was to admit the title to the property to be in the vendee, for the vendees could not be made to pay the entire purchase money of the property without at the same time having their vendor's title vested in them. From the time the vendors elected which of the two courses they would pursue, the other was closed to them. Thomas & Son did not assert their right to the property until it was seized under the appellant's attachments, and this was after the first payment of purchase money became due; but they did indorse and transfer both the notes given for the purchase money before they matured. The holders of the notes did not thereby become assignees of the contract, and hence could not avail themselves of its provisions and recover the property if the notes were not paid. Thomas & Sons having placed the notes beyond their own reach could not reclaim the property, for, in order to do so, they were obliged to cancel the notes or return them to the vendees. But the effect of the transfer was to sign to the indorsers the right to enforce against the vendees the collection of the notes. This was the only right they did possess, and the vendors intended to confer it upon them by means of the indorsement, and at the same time to divest themselves of all right to the property. Having elected to have the notes enforced and abandoned their rights to claim the property, the title vested in Bousset & Seisfield.

The trust relation between Thomas & Sons and Bousset and Seisfield, created by the contract, was severed by the action of the former; and the latter were no longer under any obligation to hold the property or its proceeds for the benefit of their vendors. Having put an end to the contract in this respect by transferring the notes, Thomas & Sons could not revive it by taking them again into their possession. The contract, once abandoned, could not be restored by any action

on the part of Thomas & Sons and the holders of the notes, without the consent of Bousset & Seisfield. If the former chose to repossess the notes they thereby obtained only such rights against the makers as were held by the parties from whom they received them—the right to enforce their payment by suit against the makers. *Bank v. Thomas & Sons*, 69 T. 237.

#### ART. 3190b. Instruments intended to operate as liens.

##### §1. Mortgages on personal property must be recorded.

(1.) When a chattel mortgage is referred to in a plea and attached as an exhibit to verify the allegations as to its contents, the fact that the exhibit does not show by indorsement that it was filed for registration with the clerk is immaterial on demurrer, which raises the question of its proper filing with the clerk, if the petition by distinct averment alleges such filing. The duty of mortgagee as to purchasers, creditors of the mortgagor and lien holders claiming under him ceases when he has in proper time deposited the mortgage with the clerk.

As to creditors, the deposit of a chattel mortgage with the clerk in compliance with the statute is absolutely necessary to give it validity; as to subsequent purchasers, the mortgage is valid if they have actual notice of its existence. *Freiberg et al. v. Magale*, 70 T. 116.

A chattel mortgage is valid without acknowledgment by the maker; and by depositing it with the county clerk, in his office, the holder has fully complied with the statute on the subject. *Hicks & Bro. v. Ross & Ridditt*, 71 T. 358.

##### ART. 3190b, §2. Indorsements on instruments.

(1.) This act does not require a copy filed with the clerk to show that the original was acknowledged, but it does require the clerk to ascertain, before he files a copy that it is a true copy, and that the original was acknowledged. The original mortgage seems to have been offered with the filed copy, and it was objected to on the ground that it had not been filed with the clerk.

The third section of the act to which we have referred provides that "a copy of any such original instrument, or of any copy thereof so filed as aforesaid, certified to by the clerk in whose office the same shall have been filed, shall be received in evidence of the fact that such instrument or copy was received and filed according to the indorsement of the clerk thereon, *but of no other fact.*" If a copy is filed with the clerk, and a question is raised as to whether it is a true copy, or as to whether the original was acknowledged, the original would seem to be the best evidence of those facts, and should be admitted to prove them; for the statute does not make the fact of filing evidence of any fact other than that the "instrument or copy was received and filed according to the indorsement of the clerk thereon." *Boykin v. Rosenfield & Co.*, 69 T. 115.

The acknowledgment or proof for registration is not necessary where the original of a chattel mortgage is deposited with the county clerk of the proper county. This disposition of the mortgage is notice.

The mortgage recited the residence of the maker. This is *prima facie* evidence to the locality of the property, indicating where the mortgage should be deposited as a record. *Chator v. Brunswick Co.*, 71 T. 589.

##### ART. 3190b, §5. Entry of satisfaction, made how.

(1.) As against parties who bought property covered by a chattel mortgage, with notice of its existence, parol evidence to show that an entry made by the clerk as follows: "Satisfied in—," is admissible to explain the circumstances under which such incomplete entry was made, and whether the mortgaged property had been relieved or not. *Boykin v. Rosenfield*, 69 T. 115.

##### ART. 3190b, §9. General principles applicable to liens and mortgages.

(9.) One who acquires an interest, even for a valuable consideration, with notice of any existing equitable claim or right in the same subject matter held by a third person, is liable in equity to the same extent, and in the same manner, as the person from whom he made the purchase. A lien upon a stock of cattle is such an equity as will be protected against persons subsequently acquiring an interest in the stock with knowledge of its existence. *Coleman et al. v. Dunman et al.*, 87 T. 390.

(10.) Where a note is given for part of the purchase price for land, it has a valid lien thereon to secure its payment. It is said to be a natural equity that the land shall stand charged with so much of the purchase money as remains unpaid. [*Flanagan v. Cushman*, 48 T. 244.]

Where the note is recited in the deed, all persons claiming under the vendee are chargeable with notice of it. They are bound to know whatever facts are recited in the conveyances which form a part of their chain of title. [Willis v. Gay, 48 T. 463.]

It is not evidence of a waiver of the vendor's lien that the conveyance recites that the note was received as cash, especially if it is described in the deed as due one day after date. The burden of proof is upon the party asserting a waiver, to show that the vendor's lien has been waived. [Irvin v. Garner, 50 T. 54.]

Where the purchase money is unpaid, giving a new note by the debtor to the vendor in renewal of the purchase money note, or giving a note to a third party, including therein interest on the old note, and commissions for advancing the money to take it up, or additional security taken subsequently, or a mortgage, or a mere change in the form of the security to secure it, will not of itself divest the lien unless so intended. [Ellis v. Singletary, 45 T. 27.]

The vendor's lien is a security for the debt of which a purchase money note is the evidence, and it subsists until the debt is paid, or the lien discharged by a valid agreement therefor. [Robertson v. Guerin, 50 T. 317.]

Where several notes given for the purchase money of the same land are in the hands of different parties, they have equal rights to satisfaction out of the land, and the holder of the last note due is not precluded from enforcing his lien against the land by a foreclosure and sale in a proceeding to which he was not a party, brought by the holder of the note which was the first to mature. [McDonough v. Cross, 40 T. 251; Delespine v. Campbell, 45 T. 628.] Dean v. Hudson, 1 U. C. 365.

The vendor's lien is not the creature of contract; it arises by operation of law, and exists only when the purchase money agreed to be paid remains unpaid, and the lien has not been waived. [Malone v. Kauffman, 38 T. 457; Flanagan v. Wynn, 25 T. 778.] Pannill v. Smith, 1 U. C. 97.

It may be true that the vendor's lien cannot be created by contract, yet the law does not prohibit parties from creating by contract a lien which shall bind real estate for the payment of the purchase money. Such liens are recognized throughout our reports, and give greater effect than the ordinary vendor's lien created by equity in cases of sale of land, when the purchase money remains wholly or in part unpaid. The lien reserved in the note may not have been a vendor's lien in the technical sense of the word, but a misnomer of it does not prevent the holder of the note from enforcing the lien he did reserve against the land to which it attaches. The demurrer was properly overruled. Helm v. Weaver, 69 T. 143.

Whether one obtains the evidence of his security or lien in one way or another, unless he waives it, he possesses a right precedent and superior to homestead rights subsequently acquired. Where A. held a deed of trust on land of B., and B. desiring to exchange his land with a third party, arranged with A. to surrender the deed of trust and take a lien on the land received in exchange, which was done, and the land so received conveyed to A., who then transferred it to B., taking a note for the amount of money secured by the deed of trust surrendered, reciting that it was for the purchase money of the land conveyed, the lien thereby created having been acquired before homestead rights of B. had been established, the land was subject to sale for the satisfaction thereof. Clements v. Neal, 1 U. C. 41.

A vendor's lien, which exists by operation of law to secure unpaid purchase money for which promissory notes have been executed, is not affected by the substitution of other notes in lieu of those first given.

Though the vendor's lien is one which equity embraces, and is not, strictly speaking, created by contract, yet our decisions recognize the right of parties to create by contract on the sale of land a lien which will bind the land for unpaid purchase money. Such a lien will be enforced when made by the parties, and its technical misdescription in a note intended to secure it, will not affect it. Helm v. Weaver, 69 T. 143.

It is not essential, in order that the purchase money due should preserve the attributes and privileges of a vendor's lien, that the amount due should be made payable to the vendor; it may be made payable to other parties at the direction of the vendor; and a new note may be given payable to a different party. The lien is unaffected thereby. [Robertson v. Guerin, 50 T. 317; Ellis v. Singletary, 45 T. 27; Wright v. Wooters, 46 T. 383.] Clements v. Neal, 1 U. C. 41.

A contract for the sale of realty cannot be avoided by showing that the vendor's title at the date of the contract was not perfect, if before the trial the vendor had secured the title. *Mitchell v. Allen*, 69 T. 70.

A purchaser of land in possession under deed with covenant of warranty from several vendors, one of whom only is alleged to be insolvent, cannot be relieved against a claim for unpaid purchase money, unless there was fraud in the sale perpetrated by the vendors at or before the sale, or a defect in the title not known to him when he purchased. *Neyland v. Neyland*, 70 T. 24.

(11.) The superior title remains with the vendor, where he sells land, taking purchase money notes, with lien reserved in the deed to secure their payment; and he may recover the land if the notes are not paid. If he transfers the notes, however, he no longer has any title in the land, superior or otherwise; nor does the superior title pass to the assignee or transferee, though the vendor's lien does, and the statute of limitations of four years will apply. [*Baker v. Compton*, 52 T. 252.] *Cassiday v. Frankland*, 1 U. C. 538; *Harrison v. McMurray*, 71 T. 122.

An exception to a petition which alleged the existence of a lien, and that such lien was reserved in notes attached to the petition as exhibits, is properly overruled when the exception is based on the ground that no such lien is reserved in the notes, if it shall appear from an inspection of the transcript that no such exhibits are contained in the record. The exception is disposed of by the general allegation that the lien was reserved.

A deed, executed and delivered to the vendees conveying land, referred to notes executed for the purchase money, but neither in the deed or notes was a lien reserved for their payment. But a small portion of the purchase money was paid, and the purchasers removed from the land and ceased possession. The vendor afterwards resumed possession, and after the purchase money notes, still unpaid, were barred by limitation, brought suit against the vendees, alleging abandonment, and to cancel the deed as a cloud upon his title. *Held*, that the defendants were not estopped to set up their legal title to the land.

To constitute an estoppel there must have been:

1. A false representation or concealment of material facts.
2. The representation must have been made with a knowledge of the facts.
3. The party to whom it was made must have been ignorant of the truth of the matter.
4. It must have been made with the intention that the other party should act upon it, and
5. The other party must have been induced to act on it. *Bynum v. Preston*, 69 T. 287.

The reservation of a purchase money lien in the notes given for land renders the sale executory in the same manner as if the reservation was contained in the deed itself, and leaves the contract of sale subject to rescission by the vendor at any time for the non-payment of purchase money. *Lundy et al. v. Pierson and Wife*, 67 T. 233.

When the vendor reserves an express lien to secure unpaid purchase money notes given for land, the contract is executory, and in default of payment he may affirm the contract and foreclose his lien, or may disaffirm it on account of the default and recover the land. In either event he must deal with the contract as an entirety. If, therefore, a note given for one of the deferred payments be barred by limitation, he cannot recover such a proportion of the land as the note barred by limitation bears to the entire purchase money, and foreclose on the remainder to enforce payment of the notes that are not barred by limitation. *Nass v. Chadwick*, 70 T. 157.

The transfer of a note given to secure the purchase money for land, either when there is an express or implied lien reserved in the deed or other instrument, carries with it the lien on the land, which the assignee may enforce by foreclosure proceedings.

In all executory contracts for the conveyance of land, whether evidenced by bond for title or deed, which retains a lien to secure unpaid purchase money, or deed and mortgage, contemporaneously made to secure deferred payments, the superior title remains with the vendor until the contract price is paid. In default of payment the vendor may elect to sue for unpaid purchase money or disaffirm the contract and recover the land.

The vendor's title to land, existing under an executory contract, does not pass by a mere assignment of the purchase money notes, and the assignee cannot, therefore, obtain possession of the land in default of payment. In such a case the vendor holds the legal title in trust, whoever may become ultimately entitled to the land. But if the assignee of unpaid purchase money notes receives from the original vendor in an executory contract for the sale of land a transfer of his superior title which exists until the contract of sale is consummated by complete payment, such assignee is subrogated to all the rights of the original vendor, and may enforce his rights by sale of the land in default of payment, though a note be barred by limitation.

A court of equity will not permit a vendor in an executory contract to disaffirm it for non-payment of purchase money notes when the vendee is willing to complete payment, and the vendor has already received part of the purchase money, or when valuable improvements have been made by the vendee, or when from any reason it would be inequitable for the vendor to recover possession. *Hamblen v. Folts & Walsh*, 70 T. 132.

Though the assignee of a note secured by lien on land may enforce the lien, the holder of such note given for purchase money of land and secured by express lien, he not being the vendor, has by virtue thereof no title to the land, and the fact that the note is barred by limitation cannot confer on such holder a right he did not possess before the note was barred; such holder has neither a right to the land nor a right to enforce collection of the note when limitation is pleaded.

The vendor of land, when an express lien for purchase money is reserved, retains the legal title, and may enforce payment under decree by sale of the land, or if there be no equitable reasons to forbid, may cancel the executory contract for sale, even after limitation has barred a recovery on the notes, for non-payment of purchase money; but the indorsee of a purchase money note can neither cancel the contract of sale or recover the land for non-payment of the contract price. If limitation runs against a note in the hands of such indorsee his remedy is gone. *Stephens v. Mathews' Heirs*, 69 T. 341.

When the vendor in an executory contract obtains a decree of foreclosure in 1873, he is thereby concluded from asserting that the superior title remains in him. After foreclosure, his position is that of a lien creditor. If a foreclosure made in 1873 was decreed against the administrator of the vendee's estate, the vendor could have had the sale made under his decree, or by asserting his lien through the probate court, he could have obtained an order of sale. If the administrator assumed to sell at private sale, and convey the property in satisfaction of the decree of foreclosure, the recitals of his deed cannot supply the place of an order of sale and confirmation of sale. The existence of these must be shown to pass title. *Bartley v. Harris*, 70 T. 181.

While a defendant who is sued upon a note given for unpaid purchase money for land may successfully defend by showing an outstanding title superior to that of his vendor, the owner of the outstanding title is not a necessary party, and should not be compelled to litigate his title in a suit involving issues which can not affect him. *Fisher v. Abney*, 69 T. 416.

The vendee in an executory contract for the sale of land, who has not paid the purchase money, must at least offer to pay before he can enforce specific performance by the vendor. The fact that limitation has run on the purchase money notes is immaterial; the obligation to pay remains, though the right of action on the notes may be barred, and payment must be made before the transfer to the purchaser of the title can be enforced.

When purchase money notes for land under an executory contract for its sale remain unpaid, the vendee, if in possession, cannot defeat the suit of the vendor for the recovery of the land, nor if out of possession can he recover against the vendor, or against any one holding under him.

If, after such default in payment as would authorize a vendor to rescind an executory agreement for the sale of land, he should sue for the unpaid purchase money, he thereby loses his right to rescind the contract, *provided* the vendee avails himself of the privilege of paying the debt. The contract, however, in such an event, still remains executory, and the vendee cannot by pleading limitation defeat the suit for the debt, and yet hold the land when he has refused to pay the contract price. *McPherson v. Johnson*, 69 T. 484.

A creditor of a vendee who, to secure his debt, receives a mortgage on land which the vendee had bargained for, but had not completed payment for, though

such vendee had a deed therefor, signed and acknowledged, which had never been delivered to him with intent that it should operate as a conveyance, does not thereby, as against the rights of the former vendor, occupy the attitude of a *bona fide* purchaser without notice in a suit by him to foreclose the mortgage. *Quære*: Whether gross negligence of the original vendor in permitting the vendee to have custody of the deed might not create an equitable estoppel in favor of the mortgagee, who extended credit in the belief that the possessor of the deed had title, and who would suffer injury by the loss of his mortgage lien? *Steffian v. Bank*, 69 T. 513.

A., desiring to acquire perfect title to a portion of a tract of land on which B. held a lien for unpaid purchase money against C., received from B. a release of his lien under an agreement with him for its execution on payment by A. of the purchase money price to C. The money was paid, but was never credited by B. on his purchase money demand against C., and was never applied to B.'s debt. In a suit by a judgment lien creditor of C., when judgment lien had attached to C.'s interest, if any, in the land, and to subject the land purchased by A. to the satisfaction of the judgment, *held*:

1. The superior title was never for an instant of time vested in C. so as to subject the land to the lien of his judgment creditor.

2. The object in contemplation by A., B. and C. being that A. should acquire perfect title, equity will effectuate such intention, and regard that as having been done which should have been done.

3. A. was subrogated to the lien held by B., and though the amount paid by A. was not in fact appropriated to the payment of B.'s lien notes, it must, in A.'s protection, be regarded as having been so paid.

4. When money due on a mortgage is paid, it ordinarily operates as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purposes of the parties. *Bank v. Ackerman*, 70 T. 315.

(12.) When one goes into possession of land under a unilateral contract which authorizes him during or at the expiration of the year for which he leases it to consummate its purchase on terms stipulated, then time is of the essence of the contract.

When time is of the essence of a contract made by the husband and wife pertaining to land the separate property of the wife, the wife is not bound by any subsequent contract made by the husband alone, for the extension of the time limited by the terms of the agreement. *Mining Company v. Bullis*, 68 T. 581.

A vendor has his election, either to rescind an executory contract for the sale of land when the vendee makes default in payment, or to subject the land to sale to satisfy the debt; but if he elects to rescind, it must be rescission of the entire contract.

If he elects not to rescind the contract, but to enforce it, the vendor is regarded as a creditor holding the superior title, and he occupies with reference to the land the same position that a mortgagee does in those states in which it is held that the legal title passes by a mortgage.

A vendor who has conveyed land by a deed, retaining a lien to secure the purchase money, who takes a reconveyance of a part of the land from his vendee in part payment of purchase money, and who subsequently conveys the part thus reconveyed to him to a third party, cannot enforce the lien on the residue of the land against a purchaser from his vendee, if such purchaser has paid in part for it and executed negotiable notes for the balance of the purchase money, when the part so reconveyed is of value equal to or greater than the sum due on the notes held by the original vendor for purchase money. The fact of the sale by his vendee and of the equities growing out of such sale being known to him, he thereby, by procuring such reconveyance, defeats his right to have all the land subjected to sale for the payment of the entire sum remaining due.

The release of one parcel or share of land from a vendor's lien in an executory contract which originally covered all other parcels or shares, would release all from the proportionate amount of their respective original liabilities which the value of the amount released bears to the total value of all. One owner being released, all the rest are entitled to the same *pro rata* abatement. When the equities of the various owners are unequal, so that their respective parcels are liable in the inverse order of alienation, if the vendor, having notice of the facts, releases



a parcel which is primarily liable, he thereby discharges or releases all the parcels which are subsequently liable, in the order of their several liabilities, from an amount of the lien debt equal to the value of the parcel released. If the value of the parcels released equals the lien debt, then all the subsequent parcels are wholly relieved from liability; if the value is less than the original lien debt, the subsequent parcels can at most be liable in their order only for the excess of the debt over such value. *Burson v. Blackley et al.*, 67 T. 5.

Payment by a vendee of the amount due his vendor under a contract for the purchase of land, on a judgment against him as garnishee, in a suit against his vendor, is a sufficient payment of the purchase money to entitle him to specific performance. [*Scarborough v. Arrant*, 25 T. 129.] *Nance v. Warren*, 1 U. C. 508.

When there is a misrepresentation by the vendor, or mistake as to the quantity of land sold, and in a suit to recover the contract price the purchaser claims a deduction on account of deficiency in quantity, his right is strictly to compensation, and not necessarily to an abatement in price proportionate to the surface deficiency.

If the land is sold in gross and the quantity stated in the deed is qualified by the words "more or less," the purchaser is entitled in equity to relief, if the deficiency be great.

When a vendor points out the land and shows its boundaries, pending negotiations for sale, and makes a sale in gross, each party having an equal opportunity to inform himself regarding the quantity, the purchaser cannot claim an abatement of the purchase money on account of deficiency, if the vendor has neither made a fraudulent representation nor said anything calculated to deceive an ordinarily prudent purchaser. *Wheeler v. Boyd*, 69 T. 293.

(14.) The payment of a debt secured by lien, though made by a stranger to the original contract, if made under an agreement with the creditor that he may hold the security for his reimbursement, subrogates him to the rights of the original creditor.

If a third party pay the entire debt secured by mortgage, under an agreement between himself and the debtor, that upon his doing so he shall be subrogated to the rights of the creditor, the agreement will be given effect, and the third party will stand in the place of the original creditor as to all persons interested in the property or the security. The rule in Louisiana under a statute governing it is otherwise.

If, however, the payment of the debt be made at the request of the debtor, with exclusive reliance on his promise to repay, the mortgage debt is extinguished, and no subsequent act of the mortgagor can revive it to the prejudice of a subsequent lien holder, or one purchasing under him. *Fievel v. Zuber*, 67 T. 275.

(15.) In rendering judgment for an amount due as purchase money on land, it is error to foreclose a vendor's lien on the land, and to direct its sale to satisfy it, in the absence of evidence that a vendor's lien was reserved by the terms of sale. *Mitchell v. Allen*, 69 T. 70.

(16.) Where a note is given for the purchase money of a survey of land, a subdivision thereof in the hands of a subsequent vendee is only bound for such proportion of unpaid purchase money as the value of the subdivision bears to the value of the entire survey.

If the payee of a vendor's lien note agrees, for a valuable consideration, by parol or otherwise, with the purchaser of the land, to waive his lien, such purchaser will hold the land free from the lien, even if the note were held by one who knew nothing of the agreement, unless the lien was reserved specially in the deed, in which case knowledge must be brought home to the holder. But if the purchaser stood by and permitted his vendor to sell the note to the holder without disclosing the fact of the waiver, he would be estopped from setting up the release against the holder. *Attaway v. Carter*, 1 U. C. 73.

In a suit to foreclose a lien reserved in a note for unpaid purchase money, which note was one of several given to secure deferred payments, it will be presumed that the other notes were satisfied, when it appears that they were due before the filing of the petition. *Fisher v. Abney*, 69 T. 416.

If the holder of a purchase money note for land sue to foreclose before an adverse claimant had any legal title to the land of which the holder had notice, the purchaser at such foreclosure sale will be entitled to recover the land.

Land in the hands of a purchaser, who buys with knowledge that the purchase money had not been paid, is subject to a lien for its payment.

The purchaser of land at a foreclosure sale is subrogated to all the rights the plaintiff in the foreclosure proceedings had at the institution of the suit. *Attaway v. Carter*, 1 U. C. 73.

(19.) A mortgage can be made to cover future debts, and such a mortgage will be good not only between the parties, but as to purchasers from the mortgagor with notice of the mortgage. *Freiberg et al. v. Magale*, 70 T. 116.

(20.) To constitute a mortgage it is essential that there should be a debt existing at the time of the execution of the instrument; though it is not necessary that there should be either a written or verbal promise to pay such debt. *Hubby v. Harris*, 68 T. 91.

Parol evidence is admissible to prove that a deed absolute on its face was intended by the parties as a mortgage, but both the parties must so intend or agree, otherwise the instrument will be what it purports to be. [*Davis v. Brewster*, 59 T. 96.] *Webb v. Burney*, 70 T. 322.

In determining whether a deed was intended by the parties to it as a mortgage, it was error to instruct the jury, in effect, that the instrument must be regarded as a deed, unless the preponderance of evidence *clearly* shows that the same was intended by the parties at the time of execution to operate as a mortgage. A preponderance of evidence is sufficient, and the use of the word *clearly* in the charge was misleading. *Prather v. Wilkins*, 68 T. 187.

It is competent to show by parol evidence that at the time when a deed was made, which on its face was an absolute conveyance of property occupied as a homestead, it was agreed that if the vendee was afterwards released from a replevy bond of the vendor on which he was surety he would convey back the land. The sufficiency of such evidence to establish such agreement is for the jury. Its legal effect (if established) as constituting an attempted mortgage of the homestead should be given in charge by the court. See opinion for reference to defective charges given and refused. *Ullmann, Lewis & Co. v. Jasper*, 70 T. 446.

(22.) Equivocal transactions by the holders of a note, not known to the maker, will not constitute as to him an estoppel. The assignment of a non-negotiable instrument, after maturity, passes no right against any defense the maker could have against the original payee. The right to order a sale of property under a deed of trust given to secure such an instrument depends upon the existence of an indebtedness. The debt satisfied, the power ceases, and a purchaser at such sale does not acquire any title to the property so sold, notwithstanding the provision of the deed of trust, that "the recitals in the conveyance made to the purchaser shall be full evidence of the matters therein contained, and no other proof shall be requisite of request by the holder of said indebtedness to the trustee to enforce this trust, or of the advertisements or sale of any particulars thereof, and prerequisites of sale shall be presumed to have been performed, and the sale under the powers herein granted shall be a perpetual bar against the maker of this trust deed, and his heirs and assigns." *Swearingen v. Buckley*, 1 U. C. 421.

When a sale of land is made by an agent of a trustee, and there is nothing in the deed of trust authorizing the trustee to appoint an agent to make the sale for him, no title passes.

A trustee empowered to sell on non-payment of the debt to secure which the trust is created, can no more appoint an agent to sell for him than he can make the sale at a time or place, or for a character of consideration different from that authorized in the deed of trust. *Fuller v. O'Neal*, 69 T. 349.

(23.) Where a mortgagor conveys to a third party the equity of redemption in trust for the mortgages, and stipulates for a reconveyance of the property upon payment by him within a certain time of the amount originally secured, if the debt is extinguished and it is optional with him whether he pay or not, the transaction is converted from a mortgage into a conditional sale. *Harvey v. Edens*, 69 T. 420.

Property may be conveyed by deed which will be construed as evidencing a conditional sale, and not a mortgage, though the consideration is the payment of a debt due from the vendor, with a condition for repurchase by paying the amount of the original debt and interest within a designated time. This occurs when it is intended and stipulated that the debt is paid by the conveyance. If

the deed was intended merely as a security for the debt, it would be regarded as evidencing a mortgage. If the deed recites in terms that the sale is conditional, the burden of proof is still upon one who seeks to have it construed as a mortgage, and to recover he must so establish it with clearness and certainty. *Miller v. Yturria*, 69 T. 549.

(26.) A chattel mortgage on certain logs then in a place designated, and on a certain number of other logs which were to be cut by the mortgagor on land described and placed with the former within a specified time, sufficiently describes the property on which the debt is secured. A mortgage on standing trees to be cut by the mortgagor is not void as a chattel mortgage. *Boykin v. Rosenfield & Co.*, 69 T. 115.

(35.) The mortgagor of his cotton crop by agreement obtained a quantity of seed cotton in exchange for a bale of mortgaged cotton, and delivered the seed cotton to the mortgagee upon the mortgage. The mortgaged bale was delivered to other purchasers. In a suit by the mortgagee to foreclose the mortgage upon the bale of cotton, the purchasers having shown the facts in evidence, were entitled to judgment for the bale of cotton against the mortgagee.

While the mortgagor did not have power to sell, yet having paid the price obtained to the mortgagee, the retention of the price is equivalent to a ratification of the sale. The mortgagee could not have the cotton and its price. *Hicks & Bro. v. Ross & Ridditt*, 71 T. 358.

(36.) When a contract stipulates for the execution of a mortgage on the delivery of articles sold to secure purchase money, if it be broken by the obligee after partial delivery, the vendor is entitled in equity to a mortgage lien on the articles delivered, which will be enforced between the parties to the contract. *Parks v. O'Connor*, 70 T. 377.

If one, under a promise to execute a mortgage to secure the payment of the thing purchased, go into possession of the property, and after using it fails to execute the mortgage, the promise to make it is in equity deemed equivalent to a mortgage as between the parties. *Railway v. Broussard*, 69 T. 625.

One having an interest in a debt who, in pursuance of an agreement between himself and the debtor, discharges the debt, even before it is due, is thereby subrogated to the rights of the creditor. If he should discharge a debt secured by prior mortgage, he is thereby subrogated to the right of the prior mortgagee to enforce repayment of the debt, and this, in the absence of a formal transfer of the mortgage. He will hold the title secured as against subsequent incumbrances, and this, when he has acquired the equity of redemption.

If one advancing money to pay on a mortgage under an agreement with the owner of the equity of redemption that it should be assigned to him as security for the money advanced, takes a discharge of the mortgage, he is still entitled to be subrogated to the rights of the mortgagee, and have the discharge vacated.

Equity will not permit the rights of a party to be lost through mistake, or ignorance of a fact, when the relief cannot operate to the prejudice of third parties. *Fears v. Albea*, 69 T. 437.

The mortgagor of personal property, while he cannot sell or remove it without the consent of the mortgagee, has a restricted control of it. If he attaches it to the homestead, it is exempt from forced sale at the suit of any other creditor, and cannot be either seized or sold under execution by the mortgagor until a judgment of foreclosure has been rendered. *Low v. Tandy*, 70 T. 745.

In the course of dealings between a New York and Texas bank, the New York bank was in the habit of discounting notes for the latter, and of forwarding the same, on maturity, to the latter "for collection and returns," with the understanding that the proceeds of such discount notes should be preserved by the Texas bank as the property of the New York bank, and should be returned to it as such. Such being the habit of business between the banks, the Texas bank received notes from its New York bank correspondent "for collection and return of proceeds," *held*:

1. The Texas bank became as to such collections, when made by it, a trustee for the New York bank.

2. After their collection was made the relation of creditor and debtor, as between the banks, did not exist. The Texas bank had no authority to credit on its books the amount collected, but was legally bound to remit the money to its correspondent.

The trust fund thus collected was credited by the Texas bank to its New York correspondent, and mingled with other money of the Texas bank; thereafter, and before an adjustment of accounts, the Texas bank became insolvent, and was placed in the hands of a receiver. *Held*, that the trust attached to whatever money remained, when the receiver was appointed, in the bank vaults.

The Texas bank, after receiving some notes from its New York correspondent "for collection and returns," procured renewals of the same, after which the Texas bank indorsed them and deposited them as collaterals with other banking houses in New York, to which they were paid, and were by them applied to the debts due them from the Texas bank. *Held*, that the New York bank, as to the amount thus collected on said notes, had no lien on the general assets of the Texas bank in the receiver's hands. One who receives the money of another in a fiduciary capacity and expends it in paying his own debts, does not thereby create a lien on the mass of his property for its repayment. The trust estate must ordinarily be clearly traced into specific property in order that the *cestui que trust* may be entitled either to the specific property or to a lien thereon.

When a trustee mingles trust money with his own, whatever he pays out afterwards to others, so long as he retains enough money to cover the trust fund, it will be presumed that he has paid out from his own funds.

[*Brochus v. Morgan* (Tenn.), 5 Central Law Journal, 53; *National Bank v. Insurance Company*, 104 U. S. 54; *Peak v. Ellicott*, 30 Kans. 156; *People v. The Bank*, 96 N. Y. 32; *Hanson v. Smith*, 83 Mo. 210; *Strother v. Cooley*, 88 Mo. 514; *McLeod v. Evans*, 66 Wis. 401, reviewed.]

The lien of a banker on the funds of his customer in his hands for his indebtedness is the result of a contract either express or implied. A bank which receives notes sent to it for discount, and to have the amount placed to the credit of its correspondent, which refuses to discount the paper, but which pays drafts drawn in the belief that the notes had been discounted, has no lien upon the notes for its reimbursement.

In such a case the bank, in settlement with a receiver of its correspondent, is chargeable with money collected on the paper thus sent for discount, and with the value of so much of it as remained unpaid to be set off by the amount of the drafts drawn upon it by its correspondent after the notes were forwarded for discount. *Bank v. Weems*, 69 T. 489.

#### ART. 3190c, §1. Owner or keeper of stallion, etc., entitled to a lien on progeny.

The owner or keeper of any stallion, jack, or bull, who keeps the same confined for the purpose of standing them for profit, shall have a preference lien upon the progeny of such stallion, jack, or bull, to secure the payment of the amount due such owner or keeper for services of such stallion, jack, or bull, and such lien may be foreclosed in the same manner as other mortgage liens upon personal property in this state; *provided*, that where parties misrepresent their stock by false pedigree no lien shall obtain.

#### §2. Lien may be enforced, when.

The lien herein provided for shall remain in force for the period of twelve months from the birth of said progeny, but shall not be enforced until six months shall have elapsed after such birth.

#### §3. Lien secured, how.

In order to fix and secure the lien provided for, the owner or keeper shall have the right at any time within sixty days after such service by such stallion, jack, or bull is rendered, to file his contract in the office of the county clerk of the county of the residence of the person benefited by such service, and cause the same to be re-

•orded in a book kept by the clerk for that purpose, and said clerk shall be allowed a fee of twenty cents for recording such contract.

**§4. Lien under verbal contract secured, how.**

If the contract or agreement be verbal, a duplicate copy of the same shall be made under oath; one to be delivered to the clerk to be recorded and filed as provided for written contracts, and the other to be transmitted to the party owing the debt.

**§5. Contract shall contain description of mother of progeny.**

The contract, written or sworn to, as provided for in the two preceding sections, shall contain a definite description by marks, brands, and color of the mother of such progeny. [Act April 3; July 6, 1889; 21 Leg. p. 115.]

## TITLE 62.—LIMITATIONS.

## CH. 1.—LIMITATION OF ACTIONS FOR LAND.

ART.	ART.
3191. Three years' possession, when a bar. <i>Annotated.</i>	3197. See Civil Statutes.
3192. "Title" and "color of title" defined. <i>Annotated.</i>	3198. Adverse possession defined. <i>Annotated.</i>
3193. Five years' possession, when a bar. <i>Annotated.</i>	3199. Possession by different persons. <i>Annotated.</i>
3194. Ten years' possession, when a bar. <i>Annotated.</i>	3200. Limitation does not run against the state, nor in favor of certain persons. <i>Annotated.</i>
3195. Ten years' possession construed to embrace what. <i>Annotated.</i>	3201. Does not run against who. <i>Annotated.</i>
3196. Possession gives full title, when. <i>Annotated.</i>	

**ART. 3191. Three years' possession, when a bar.**

(1.) The antiquity of a previous perfected and vested right does not involve the doctrine of equitable bar, and where one sues in trespass to try title and for possession and partition of land claimed under an executed deed, and not an executory contract, the defense of stale demand is not applicable. *Henderson v. Beaton*, 1 U. C. 17.

Stale demand has no application where a plaintiff asserts his legal title, asking no equitable relief, and he can only be defeated by the general law of limitation applicable to purely legal demands. *Fletcher v. Ellison*, 1 U. C. 661.

The doctrine of stale demand can have no application as against one holding the legal title, when invoked by one claiming an equitable right. *Harvey v. Cummings*, 68 T. 599.

In the case of *Williams v. Conger*, 49 T. 602, Associate Justice Moore says: "We know of no authority to warrant the court in holding that a mere failure to pay taxes, or laches, or delay of the owner in bringing suit for the recovery of the land to which he has a legal title, will defeat his action, where there has not been actual adverse possession for a sufficient length of time to support the plea of limitation." *House v. Brent*, 69 T. 27.

The doctrine of stale demand has no application to a legal title. It has no application to the claims of the true owner of land when set up by one claiming the land under a tax deed when no compliance with the steps prerequisite to its validity is shown. *Telfener v. Dillard*, 70 T. 139.

**ART. 3192. Title and color of title defined.**

(1.) The re-enactment of the law defining color of title with no change in its language, carried with it the construction given to the former statute in *Marsh v. Weir*, 21 T. 97. It is only such a defective muniment of title as is not wanting in "intrinsic fairness and honesty" that will support the statute of limitations of three years. Color of title cannot, in contemplation of the statute, exist when one of the links in the chain of title has been fraudulently obtained. *Hussey v. Moser*, 70 T. 42.

(3.) Land legally surveyed under location of a valid land certificate, is segregated from the mass of public domain; the equitable title is thereby vested in the owner of the certificate against which the statute of limitations will run in favor of an adverse occupant claiming the land. *Udell v. Peak*, 70 T. 547.

A sheriff's sale of land, if valid, breaks the chain of title of the defendant in execution remaining in or taking possession subsequent to the sale, and claiming under the statute of limitations of three years, as against the holder of the title which passed by the sheriff sale.

Facts where inadequacy of price was accompanied by facts accounting for such price. *Blum v. Rogers*, 71 T. 669.

(17.) A claimant under a tax deed recorded, who fails to show a compliance with the law in those steps prerequisite to its validity, cannot obtain title under the three years' statute of limitations. *Telfener v. Dillard*, 70 T. 139.

(18.) Adverse possession of an alley under a deed to the lots abutting on it, will not support the plea of the statute of limitations of three years. [*City of Galveston v. Menard*, 23 T. 409.] *Dwyer v. Hosea*, 1 U. C. 596.

Mere naked possession of land for three years, united to a subsequently acquired chain of title, will not constitute title or color of title within the meaning of the statute of limitations. [21 T. 731; 27 T. 249.] *Henderson v. Beaton*, 1 U. C. 17.

**ART. 3193. Five years' possession, when a bar.**

(3.) In the absence of evidence showing payment of taxes, the defense of limitation of five years cannot be considered. *Henderson v. Beaton*, 1 U. C. 17.

The possessor, under a junior grant, who pays taxes upon the land in litigation under assessment in name of the junior grant, is not deprived of the benefit of such payment by reason of his not paying in the name of the senior grant. The description of the land is good upon either grant. *Harrison v. McMurray*, 71 T. 122.

(7.) One who has conveyed the land of which he is in possession, thereby precludes himself from claiming title thereto under a statute of limitation under a deed prior in date to his conveyance. *Voight v. Mackle*, 71 T. 78.

The statute of limitations of five years applies only when the adverse possession has been continuous during the full period of five years, and the deed or deeds under which title is claimed have been registered during the same continuous period. An adverse possession antedating the registration of the deed cannot be estimated in computing the five year period of limitation. *Harvey v. Cummings*, 68 T. 599.

A party asserting title under limitation of five years must show privity of title and possession under the recorded deed under which the limitation is claimed. *Stout v. Taul*, 71 T. 438.

(11.) Under the statute of limitations of five years, it is not necessary that the recorded deed under which possession is held should have been executed by more than one of two persons composing a partnership to whom power to convey was conferred by the claimant of title, he signing the firm name, or that any connection should be shown between the vendor and the original grantee. Nor is it fatal to the plea of limitation that the deed describes the land erroneously as to the survey of which it was supposed to constitute a part, if the description contained in it in other respects, with reference to objects in the ground marking the boundaries of the land occupied, fixes certainly its locality. *Udell v. Peak*, 70 T. 547.

(12.) Land owners are bound to take notice of all deeds recorded in the county where their land lies, in so far as the boundaries in such deeds may extend, to protect their possession from encroachment under the five years' statute of limitations. But no one is bound to take notice of things extrinsic of the contents of the deed itself, unless in cases where the law imposes it as a duty to examine the records, such as when one claims to hold land as an innocent purchaser without notice, or when there is a deed in the chain of title through which one claims, or the like. But surely not in a case where a stranger claims under a recorded deed that has no connection with the title. The owner of land ought not to be deprived of his title and possession, unless the statute of limitations is complied with in every substantial particular. *Brokel v. McKechnie*, 69 T. 32.

In order that the five years' statute be invoked, it is just as essential that the deed be duly registered, as that there should be a deed, and just as essential that the land described in the deed should coincide with the land held in possession, as it is that there should be a payment of taxes under such registered deed. *Brokel v. McKechnie*, 69 T. 32.

Parol evidence is not admissible to explain the misdescription by showing that there was but one tract of land granted to the patentee in the county. The rule which permits parol evidence to explain a latent ambiguity has generally no application, except as to the parties and privies to the instrument sought to be explained. *Brokel v. McKechnie*, 69 T. 32.

A description of land in a deed otherwise identifying it is not vitiated by a mistake in giving the number of the certificate by which the land was located. *Stout v. Taul*, 71 T. 458.

(18.) A deed to a lot in a city or town only conveys the land to the line of the street, and the statute of limitation of five years does not apply where the owner

takes and holds adverse possession of a portion of the street adjoining. *Rippetoe v. Low*, 1 U. C. 475.

A deed from a city to a portion of an alley will not pass title thereto, but adverse possession under such deed and payment of taxes for the required time will support the statute of limitation of five years. *Dwyer v. Hosea*, 1 U. C. 596.

To sustain the plea of limitation of five years, continuity of possession and privity in the title are requisite, with the other conditions of hostile claim. When possession is claimed under different titles, and the requisite term of occupancy has elapsed under neither, but the possession under one title must be tacked to that under another in order to make out the five years, a privity must be shown between the various titles under which possession is claimed, or its continuity will be broken, and the statute will not avail the defendant. See opinion for facts showing the requisites of privity of title and continuity of possession. *Heflin v. Burns*, 70 T. 347.

(20.) A trustee cannot prescribe under the five years' statute in a suit to compel a reconveyance in accordance with the term of the trust deed under which he entered, except for that period of time which may elapse after he has repudiated the trust and given notice thereof to the *cestui que trust*. *Neyland v. Bendy*, 69 T. 711.

**ART. 3194. Ten years' possession, when a bar.**

A suit prosecuted to effect against the tenant in possession within ten years from the adverse entry by the landlord breaks the continuity of the possession and avoids the defense of ten years' limitation when asserted by the landlord against the holder of the proper title. *Stout v. Taul*, 71 T. 438.

**ART. 3195. Ten years' possession construed to embrace what.**

(2.) A purchaser, the calls of whose deed through mistake extended over and embraced one hundred and seventy-three acres of an adjoining survey to which the vendor held no title, improved and occupied the land so included by mistake, but he asserted no claim to any portion of such adjoining survey, except to the land so occupied and improved by him until after the expiration of ten years and after he had abandoned possession. *Held*, that his actual and constructive possession were identical, and he obtained no title under the ten years' statute to any portion of such adjoining survey, except that which was actually and visibly appropriated by him under a claim of right inconsistent with, and hostile to, the claim of the true owner. *Ivey v. Petty*, 70 T. 178.

(3.) Where the defendant relies on ten years' possession he must show privity between himself and those whose possession he claims, as part of his title, under the statute. [46 T. 222.] *Henderson v. Beaton*, 1 U. C. 17.

**ART. 3196. Possession gives full title, when.**

(2.) When the period of limitation has fully run in favor of an adverse possessor of land, it confers title on him which he may assert against the former owner, though his possession ceased after his title by limitation was acquired. *Branch v. Baker*, 70 T. 190.

(3.) Naked possession of land for ten years of the character prescribed in the ten years' statute of limitation, invests the possessor with a title as absolute as if it had been acquired by patent from the state, and on which he may sustain an action of trespass to try title. If the homestead of the family of one holding such possession is on the land, no part of it can be alienated by parol.

A parol contract of sale cannot be enforced against such possessor through the operation against him of an estoppel *in pais*, when the plaintiff setting up such estoppel was not caused by such parol contract to change his position for the worse, and when the possessor on his part acquired no right of property, of contract, or of remedy. *Bridges and Wife v. Johnson*, 69 T. 714.

**ART. 3198. Adverse possession defined.**

(1.) One who sells a lot to be used as city property, which at the time is inclosed in a field, cannot successfully set up the statute of limitation against the grantee, merely because the latter fails to take actual possession, and permits it to remain in the original inclosure. To make limitation effectual in such a case, the vendor must show some notorious act evincing a claim of ownership over the property, distinctly hostile to the claim of the grantee. The possession must not only be actual but visible, continuous, notorious, distinct and hostile, and of such



a character as to indicate unmistakably an assertion of claim of exclusive ownership in the occupant. *Evans v. Templeton*, 69 T. 375.

(3.) One making an entry upon land under a claim of title thereto by a recorded deed is deemed to hold possession co-extensive with the boundaries stated in his deed, when there is at the time no open adverse possession of the land in any other person. *Fletcher v. Ellison*, 1 U. C. 661.

(4.) When there is a conflict between two surveys which have been patented, and the owner of the junior grant has possession of only a part of that portion which is in conflict, and the owner of the elder grant has had like occupation of that portion of his grant which is not included in the conflict, the statute of limitations is only available to the owner of the junior grant to the extent of his actual possession.

There can be but one constructive possession of the same land, and in case of a conflict, the seizure and possession of the true owner must prevail over the claim by construction of possession by one who holds under mere color of title. *Anderson v. Jackson*, 69 T. 346.

(11.) Title by limitation cannot be secured by an occupancy of a few varas of land adjoining that owned by the occupant, when such occupancy encroached beyond the true division line without design to claim adversely, and, when the true location of the line was not certainly known until a survey, and after such possession. *Blassingame v. Davis*, 68 T. 595.

(16.) The placing of rails on land, no further act being shown toward exclusive possession, is not sufficient to start limitation. The assertion of an adverse and exclusive right to the land, no matter how long continued, cannot avail unless accompanied with exclusive possession.

An actual inclosure of land in possession is not in all cases necessary to meet the requirements of exclusive possession under the statutes of limitation. The character, situation and adaptability of the land for specific uses, in connection with the use made of it by one claiming limitation, may be looked to in determining whether the occupation is exclusive.

The adverse claim may be manifested by facts which will not amount to an exclusive possession; while an exclusive possession may be such as to be sufficient evidence of an adverse claim.

If, in addition to placing material around land to inclose it, the claimant should begin to construct a fence, and while doing so should, by other means than the fence, secure to himself, and actually have, exclusive possession and occupancy, it would seem that limitation would run from the time the exclusive occupancy began.

When the acts done on land by a claimant thereof are such as to give unequivocal notice to all of the adverse claim, and this is accompanied by actual exclusive possession, then limitation will run in favor of such claimant from the time exclusive occupancy began, whether the land be inclosed or not. *Richards v. Smith et al.*, 67 T. 610.

(17.) The registration of a deed conveying land to one holding it at the time as tenant of a third party, is not of itself evidence of a repudiation of the tenancy or of an adverse possession. The statute will not run in favor of such tenant until he notifies his landlord that the tenancy is repudiated. What will constitute such notice must depend much on the facts of the particular case. *Udell v. Peak*, 70 T. 547.

(24.) Though a deed be absolute, with clause of general warranty, if executed with a trust not apparent on its face, that the vendee will hold the title for the benefit of himself and others, and the vendor by his acts and declarations induces the *cestui que trust* for a period of time to believe that he will in good faith execute the trust, no limitation will run during such period. The same protection against limitation exists, though the vendee has conveyed the land by similar warranty to others, who in like manner induced the *cestui que trust* to believe they would respect and execute the trust; and this though the second vendees be purchasers for value. *Smith v. McElyea*, 68 T. 70.

S. immigrated to Texas in 1836, and afterwards married and received a land certificate for one league and labor, one-third being granted to him individually and two-thirds being an augmentation resulting from his marriage. In 1838 the husband and wife conveyed the entire certificate to B., authorizing to be located

in B.'s name, in trust, that B. should, when patent issued, transfer the two-thirds to the wife of S. A divorce was granted S. in 1850, and by that marriage he had children. The certificate was established in 1846 as genuine, and S., after swearing that he had never transferred it, and that it was lost, obtained a duplicate, which he caused to be located, and obtained a patent thereon in 1850. B. died in 1867 and S. in 1883, the latter having delivered before his death the patent to the children of the first marriage. No possession was taken until 1883. The children of the second marriage sue for the land. *Held*:

1. No presumption can arise from the facts stated and from the further fact that land certificates are personal property, and may be transferred by delivery, that B. sold and retransferred the certificate to S.

2. The legal and equitable title to the certificate was vested in B. by the deed from S. and wife. The fact that the government issued patent for the entire league and labor, including the augmentation, to S. instead of B., as was intended, did not affect the statute of the two-thirds conveyed by deed in trust, and neither S. nor his heirs could acquire title to it without first repudiating the trust.

3. A conveyance of part of the land to a stranger by S. before his death operated as a repudiation of the trust only *pro tanto*.

4. For reasons given in the opinion, the doctrine of stale demand has no application.

5. The children of the second marriage inherited no interest in the two-thirds of the land.

6. After receiving the duplicate certificate S. had no authority to convey the land secured to the children of the first marriage in consideration of the location of the certificate, either from the fact that he was tenant in common or because he held B.'s portion of the certificate in trust for him. *Goode v. Lowery*, 70 T. 150.

When proprietors of adjacent lands are each in like possession, the improvement made by one, which encroaches but slightly over the dividing line, does not necessarily affect the other with notice of an effort to acquire the land by limitation. Limitation would only apply to the portion actually adversely occupied. *Tucker v. Smith*, 68 T. 473.

A trustee cannot, by any act which is unknown to the beneficiary in the trust, set the statute of limitation to running against the *cestui que trust*. *Leach v. Willson Co.*, 68 T. 353.

(25.) The possession of a co-tenant or tenant in common will be presumed to be in right of the common title. The tenant cannot claim the protection of the statute of limitation, unless it clearly appear that he repudiates the title of his co-tenant and is holding adversely to it. In such case his acts and declarations will be construed much more strongly against him than when there is no privity of title. *Franks v. Hancock*, 1 U. C. 554.

#### ART. 3199. Possession by different persons.

(1.) The doctrine of stale demand applies only to an equitable title. *Land Co. v. Chisholm*, 71 T. 523.

#### ART. 3200. Limitation not to run against state, etc.

(2.) In the absence of statutory prohibition, limitation will run in favor of or against a county. *Caldwell County v. Harbert*, 68 T. 321.

#### ART. 3201. Does not run against certain persons.

(2.) Construing this article in connection with *Kelly v. Whitman*, 41 T. 647; *Simonton v. Mayblum*, 59 T. 7, and *Smith v. Uzzell*, 61 T. 221; *held*, that the law which suspends the operation of the statutes of limitation as against the wife during coverture, has no application to suits involving the homestead when it is claimed as the separate property of the husband, or as part of the community estate. In either case the right of the wife to maintain an action during coverture, in her own name, exists.

[This case distinguished from *Simonton v. Mayblum*, 59 T. 7, and *Smith v. Uzzell*, 61 T. 221.]

An exception in favor of the wife who sets up claim to the homestead merely as such, cannot be engrafted on the statutes of limitation by the courts, and the fact that the husband, in alienating the property, has acted in hostility to her

claim, will not suspend the operation of the statute as against one in possession claiming under deed.

A married woman directed her daughter to sign in her name a conveyance of property which had once been occupied as a homestead by the husband and wife, and which was community property. The wife believed the instrument was a lease. It was a deed absolute. The daughter signed and acknowledged the deed, which was recorded. The fraud practiced by the husband was soon discovered by the wife, who on account of the husband's physical condition, refrained attempting to procure a cancellation of the deed until after an innocent purchaser and his vendor had been in actual, peaceable adverse possession of the property for eight years, when after the death of the husband the widow sued to recover the property; *held*, that without considering the question of estoppel, the plaintiff was barred by limitation. *Hussey v. Moser*, 70 T. 42.

Where the defendant has never repudiated his obligation to the plaintiff, there is no limitation to a suit on a contract made by the defendant to buy and locate land certificates for the plaintiff with money received from him for that purpose. *White v. Affleck*, 1 U. C. 78.

## CH. 2.—LIMITATION OF PERSONAL ACTIONS.

### ART.

3202. See Civil Statutes.

3203. Action to be commenced in two years. *Annotated.*

3204, 3205. See Civil Statutes.

3206. On bond of executor, etc. *Annotated.*

3207. All other actions barred, when. *Annotated.*

### ART.

3208. See Civil Statutes.

3209. Actions for specific performance. *Annotated.*

3210. Judgment shall be revived when. *Annotated.*

3211 to 3214. See Civil Statutes.

### ART. 3203. Action to be commenced in two years.

(7.) A land certificate being the mere evidence of a right, which right is in contemplation of law personal property, no adverse possession thereof can give title by limitation, either to the certificate or to the right, of which it constitutes the evidence. *Harvey v. Cummings*, 68 T. 599.

(8.) If an act is done which in itself is an invasion of the right of another, which being done, injury is the natural sequence, then limitation will run against the right to recover damages from the time the unlawful act was committed, though the injury may not have been discovered until within a period before suit less than would be sufficient to complete the bar of the statute. *Water Works v. Kennedy*, 70 T. 233.

Though a parol contract for the conveyance of land for services to be rendered may not be enforced, an action may be maintained to recover the value of the services performed under it. When the services extend during a period which would ordinarily bar the claim for their value, yet if they are rendered in good faith, and the owner of the land accepts the benefit conferred by them, without disaffirmance of the parol contract, limitation will not begin to run against an action to recover their value until the renunciation of the agreement. In such an action the vendor will not be entitled, by way of offset, to the value of aid or supplies furnished the purchaser, which were advanced and accepted at the time as a gratuity. *Stevens v. Lee*, 70 T. 279.

Limitation does not run against a school claim during the period of its recognition by the county as a valid claim, and not until after its disallowance. [Stats. Art. 677.]

The Legislature may require a county to pay a just debt, and thereby enable the creditor to enforce its collection, even after the lapse of such time as would otherwise bar it by limitation. *Caldwell County v. Harbert*, 68 T. 321.

When an act is in itself lawful as to the person who bases thereon an action for injuries subsequently accruing from, and consequent upon, the act, the cause of action does not accrue until the injury is sustained. *Water Works v. Kennedy*, 70 T. 233.

Under sections 2 and 3, of this article, the right to recover personal property is barred by two years' adverse possession. Such bar concludes the owner's right, and vests title in the holder of the property.

After title has passed by such adverse possession, the fact that the property came into the possession of the former owner without claim by him of ownership, would have no effect upon the right of the owner by right of the adverse possession.

The Revised Statutes, sections 2 and 3, of this article, substantially re-enacts the law as it was before. [Early Laws, Art. 997.] The decisions upon the former statute of limitations, upon the recovery of personal property, apply to the re-enactment in the Revised Statutes. *Connor v. Hawkins*, 71 T. 582.

**ART. 3206. On bond of executor, etc.**

(1.) Though the death of the ward terminates the representative relation which his former guardian sustained to him, yet the guardian is not thereby *discharged* from his guardianship in contemplation of law. The words, "removal," "resignation" and "discharge," as used in article 3206, Revised Statutes, must be construed in the light of articles 2688, 2682, 2614 and 2616, and thus construed, limitation does not begin to run in favor of a guardian or of the sureties on his bond upon the death of his ward, but runs only from the time when an order of court has been entered of record, declaring the resignation, removal or discharge of such guardian. *Marlow v. Lacy*, 68 T. 154.

**ART. 3207. All other actions barred, when.**

(1.) Equity will always refuse relief to stale demands when a party has slept upon his rights for a great length of time. Nothing can call forth its active interposition but conscience, good faith and reasonable diligence. Laches and neglect are always discountenanced.

One whose land has been conveyed by sheriff's deed under a voidable judgment rendered against him, cannot, when chargeable with notice of the adverse deed and in possession of the evidence on which he relies to set aside the judgment, wait for ten years, during which the courts are open to him, and then maintain a suit to clear his title of the adverse claim.

The fact that one seeking equitable relief after such a lapse of time was, during a portion of that period, in possession of the land, cannot excuse his laches. His possession gave notice of the adverse claimant of his claim, but not that he would assert such claim in a suit to cancel the deed which assumed to convey, under the judgment of a court, his title to another.

One whose land has been sold under a judgment which he claims to have been voidable, cannot excuse his apparent laches in instituting a suit to set it aside, on the ground that he could not procure the title papers to the land. In such a proceeding there is no necessity for the plaintiff to establish his own title as against an adversary who claims under him. *Walet v. Haskins*, 68 T. 418.

(2.) Proceedings to correct a misdescription in a decree of partition entered prior to May 21st, 1871, and brought August 29th, 1883, are brought too late. [47 T. 239; 51 T. 647; 53 T. 85.] *Tevis v. Armstrong et al.*, 71 T. 59.

**ART. 3209. Actions for specific performance.**

(2.) When the obligation to convey land is independent and unconditional, recognizing the conveyance as a duty dependent on an event to occur in the future, but which had already happened, and in ignorance of which the parties acted, but the existence of which could readily have been ascertained by an inspection of the public records, and the obligation bore date before the adoption of the Revised Statutes, a claim for specific performance was barred either under the law as it existed when the contract was made or under this article, in the twelve years and two months which elapsed between the date of the obligation and the time when suit was filed to enforce it. *Meyer v. Andrews*, 70 T. 327.

A bond was given in 1837 in the sum of five thousand dollars, conditioned that the obligor should make to the obligee a title to two-thirds of a league and labor of land, "the remaining portion" of the head-right to which he believed himself entitled, but to which no certificate or evidence of right had then issued. In 1838 a certificate issued to the obligor for one league and labor of land as the head of a family. It was located for the obligor in this bond, and the patent issued in his name in 1852. In a suit brought by the heirs of the obligee in 1885, against parties in possession as purchasers from the heirs of the obligor, *held*,

1. In order to entitle the heirs of the obligee to recover the land, they should establish, 1, a consideration; 2, a trust in the certificate, and, 3, through this, a trust in the land.

2. A proceeding to enforce specific performance of the executory contract evidenced by the bond, not having been begun in proper time, it was barred as a stale demand.

3. In the absence of evidence that the certificate was located for the obligee or his heirs, a two-thirds interest in the land would be the utmost they could have recovered under any circumstances. *Wilson v. Simpson*, 68 T. 306.

Though the lapse of ten years after the date of an executory contract will, as a general rule, bar an action for its enforcement, this rule will not apply as against a vendee in possession under it, when he has complied with his part of the contract. *Goode v. Lowery*, 70 T. 150.

A contract was made June 22d, 1838, for the location of a league certificate, the locators to have one-half of the land; deed to be made upon issuance of patent, and to pay all expenses of locating, surveying and obtaining title, and to pay fifty dollars. Under the contract the locators paid the fifty dollars, and located the certificate February 28th, 1840, and caused the field-notes and certificates to be returned to the land office December 20th, 1840. The land was in conflict with an older grant, in name of Rafael De Aguirre, the conflict being known to all the parties at the time the location was made. The commissioner of the land office refused to patent, on account of the conflict, until July 21st, 1884, when patent issued to a vendee of the owner of the certificate. The locators being dead, the office fees and dues were paid by the patentee. Suit was brought for specific performance June 8th, 1885. *Held*:

1. The delay in obtaining patent was excused by the facts.

2. The suit could not be brought for title until after patent issued.

3. The claim was not stale at the filing of the suit. *Campbell v. McFadin*, 71 T. 28.

In an action for a locative interest upon a contract for a deed to be made on issuance of patent, such claim does not become a stale demand until ten years after issuance of patent in absence of complaint or repudiation of the contract on account of delay before patent, regardless of the time between the contract and the patent. *Tevis v. Armstrong et al.*, 71 T. 59.

**ART. 3210. Judgment shall be revived, when.**

(2.) Where a direct proceeding has been instituted by a judgment creditor before the judgment has become dormant, it is not necessary to issue executions subsequent to such suit in order to prevent the judgment from becoming dormant. *Cole v. Terrell*, 71 T. 549.

### CH. 3.—GENERAL PROVISIONS.

**ART.**

3215. Suspension of, during late war.

*Annotated.*

3216 to 3218. See Civil Statutes.

3219. Acknowledgment must be in writing. *Annotated.*

**ART.**

3220, 3221. See Civil Statutes.

3222. Limitation shall not run against infants, etc. *Annotated.*

3223 to 3226. See Civil Statutes.

**ART. 3215. Suspension during late war.**

(1.) On the 18th of January, 1862, an act was passed to suspend the statute of limitations on bills, bonds, promissory notes and all contracts for the payment of money, until the 1st day of January, 1864, or until six months after the close of the present war. [Early Laws, Art. 3008.]

By the act of February 26th, 1863, an act was passed suspending all statutes of limitation on civil rights of action of every kind, whether real or personal, until one year after the close of the war between the Confederate States and the United States. [Early Laws, Art. 3048.]

The war closed in Texas August 20th, 1866.

By the ordinance of March 30th, 1866, it was provided that, in all civil actions, the time between the 2d of March, 1861, and the 2d of September, 1866, shall not

be computed in the application of any statute of limitations. [4 Sayles' Civ. Stat. 342.]

The 43d section, of the 12th article, of the Constitution of 1869, provided that the statutes of limitation of civil suits was suspended by the so-called Act of Seccession, of the 28th of January, 1861, and shall be considered as suspended within this state until the acceptance of this Constitution by the United States Congress. [Sayles' Annotated Statutes, vol. 4, p. 406.]

The validity of these provisions has been recognized in the following cases: *Maloney v. Roberts*, 32 T. 136; *Haddock v. Crockeron*, 32 T. 276; *Waters v. Waters*, 33 T. 50; *Bender v. Crawford*, 33 T. 745; *Rivers v. Washington*, 34 T. 267; *Andrus v. Randon*, 34 T. 536; *Dwight v. Overton*, 35 T. 390; *Moseley v. Lee*, 37 T. 480; *Bentlnck v. Franklin*, 38 T. 458; *Wood v. Welder*, 42 T. 396; *Kennedy v. Briere*, 45 T. 305; *Lewis v. Davidson*, 51 T. 251.

Sec. 14, of Art. 12, of the Constitution of 1869, Sayles' Annotated Statutes, vol. 4, p. 448, provides that married women, infants and insane persons shall not be barred of their rights of property by adverse possession, or law of limitation, of less than seven years from and after the removal of their respective legal disabilities.

In *Grigsby v. Peak*, 57 T. 142, it was held that the Constitution of 1869 took effect on the 30th of March, 1870.

In *Peak v. Swindle*, 68 T. 242, it was held that the Constitution became operative when ratified by the vote of the people, at the election held on the last day of November and the three first days of December, 1869. The Constitution of 1869 was suspended by the Constitution of 1876, which took effect April 18th, 1876.

(2.) The suspension of the statute of limitation, during the Confederate war, will be taken notice of without it being pleaded as an exception to the running of the statute. *Maverick v. Flores*, 71 T. 110.

#### ART. 3219. Acknowledgment must be in writing.

(1.) A new promise to pay a claim which is otherwise barred by the statute of limitations, by which the promisor agrees to pay "if I owe it," does not relieve the claim from the operation of the statute, there being no recognition expressed of the justness of the claim. *Meyer v. Andrews*, 70 T. 327.

(2.) A debtor on open account wrote to his creditor, November 14th, 1882, in reference to the debt, saying: "I will, if I am ever able, pay it." The amount of the debt at the date of the letter was established, and it was also shown that in October, 1885, the debtor had acquired and owned an amount of money more than sufficient to pay his debts, including the account. In December, 1885, he was sued on the written conditional promise. *Held*:

1. The existence of the original debt being shown, and the reference made to it in the letter being established, the claim was not barred by limitation, but the right of action accrued on the written promise at the time when the defendant first had the ability to pay.

2. The plaintiff was not bound to show that the defendant continued to be able to pay, after showing that such ability once existed.

3. The fact that the defendant, after being able to pay, invested his money in a homestead, could not defeat the plaintiff's right of action. *Lange v. Caruthers*, 70 T. 718.

The defense of limitation must be specially pleaded, though this may be done by special exception when the bar of limitation is disclosed by the petition. When limitation is pleaded and a new promise is set up, the recovery, if limitation has run against the original cause of action, must be on the new promise.

If the plaintiff suing on a note apparently barred by limitation, sets up also a new promise, he may recover on the original cause of action, unless limitation is specially pleaded by the defendant. *Gathright v. Wheat*, 70 T. 740.

#### ART. 3222. Limitation shall not run against infants, etc.

(3.) Limitation will not run during marriage against the right of the wife to recover damages for the wrongful seizure and forced sale of her property, protected from forced sale by statute. The fact that the right of a married woman to maintain such an action has been recognized by the courts, when necessary to enable her to protect herself against the action of her husband and others, affords no reason that she should be denied the benefit of a statute which permits her to

T. 62a, 63.] LIQUORS, ETC.—LOCAL OPTION. Arts. 3226a–3239c.

sue after the marriage relation has been dissolved. *Alsup & Thompson v. Jordan*, 69 T. 300.

(4.) A legislative suspension of the statutes of limitation will not enable one who was an infant before and during the period of such suspension, when the adverse possession began, and who was a *feme covert* when the operation of the statute was restored, to avoid the effect of limitation on account of such coverture. The purpose of article 12, section 43, of the Constitution of 1869, was to prevent the suspended period from being taken into account in the computation of the time required by the statute to bar an action, and not to restore a disability already removed. *Ragdale v. Barnes*, 68 T. 504.

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## TITLE 62a.—LIQUORS; SALE OF REGULATED.

ART. 3226a. See Civil Statutes.

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## TITLE 63.—LOCAL OPTION.

ARTS. 3237 to 3239c. See Civil Statutes.

## TITLE 64.—MILITIA.

## CH. 1.—GENERAL PROVISIONS.

ARTS. 3240 to 3244. See Civil Statutes.

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## CH. 2.—THE COMMANDER-IN-CHIEF AND HIS STAFF.

ART.  
3245 to 3248. See Civil Statutes.

3249. His staff, and how constituted.  
*Amendment.*

ART.  
3250 to 3257. See Civil Statutes.

## II. HIS STAFF.

## ART. 3249. His staff, and how constituted.

§1. The adjutant-general shall have the rank of brigadier-general; and in the corps of adjutant-general there shall be to each division one assistant adjutant-general with the rank of lieutenant-colonel, and to each brigade one assistant adjutant-general with rank of major.

§2. In the inspector-general's department there shall be one assistant inspector-general with the rank of colonel, and to each division one assistant inspector-general with the rank of lieutenant-colonel, and to each brigade one assistant inspector-general with rank of major.

§3. In the quartermaster's corps there shall be an assistant quartermaster-general with the rank of colonel, and to each division a quartermaster with rank of major, and to each brigade a quartermaster with rank of captain.

§4. The bureau of military justice shall consist of one judge-advocate-general with rank of colonel, and one assistant judge-advocate-general with rank of major to each division.

§5. The state health officer shall be *ex officio* surgeon-general, and shall have the rank of colonel. In the medical corps there shall be to each division a medical director with the rank of lieutenant-colonel, and to each brigade a surgeon with the rank of major.

§6. The adjutant-general shall be appointed by the commander-in-chief, by and with the advice and consent of the senate, if in session, and all other staff officers of the general staff shall be appointed by the commander-in-chief, and shall constitute a permanent staff department as in the United States Army; *provided*, that all staff officers now holding commissions shall hold their present rank until the commander-in-chief shall otherwise direct.



§7. The staff of the commander-in-chief shall consist of the adjutant-general, the judge-advocate-general, the senior assistant inspector-general, and senior assistant quartermaster-general, and six aides-de-camp each, with the rank of lieutenant-colonel, to be appointed by him. [Amendment April 5, 1889; 21 Leg. p. 12.]

### CH. 3.—THE FRONTIER COMPANIES AND BATTALION MOUNTED POLICE.

ARTS. 3258 to 3291e. See Civil Statutes.

### CH. 4.—THE VOLUNTEER GUARDS.

#### ART.

3292. See Civil Statutes.

3293. How constituted. *Amendment.*

#### 1. Company Organization.

3294. Manner of forming companies. *Amendment.*

3295. What officers to be elected. *Amendment.*

3296 to 3303. See Civil Statutes.

#### 2. Regimental and Other Organizations.

3304. Shall be organized into divisions, etc. *Amendment.*

3305. See Civil Statutes.

3306. Regimental organization. *Amendment.*

3307. Brigade organization. *Amendment.*

#### ART.

3308. Staff officers, etc. *Amendment.*

3309 to 3317. See Civil Statutes.

#### 5. Penalties and Their Enforcement.

3318. Code of regulations to be established. *Amendment.*

3319 to 3326. Repealed. (See 3329a.)

#### 6. Courts Martial.

3327. Courts martial for certain offenses. *Amendment.*

3328. See Civil Statutes.

3329. Extent of punishment. *Amendment.*

3329a. Articles repealed. *New.*

3330 to 3347. See Civil Statutes

#### ART. 3293. Volunteer guards, how constituted.

Volunteer guards shall be constituted by voluntary enlistment for a period not less than three years on the part of persons held to military duty under the laws of the state, or of persons that may be exempt under such laws. [Amendment April 5, 1889; 21 Leg. p. 12.]

#### 1. COMPANY ORGANIZATION.

#### ART. 3294. Manner of forming companies.

Any number of persons not less than forty nor more than one hundred, of good moral character, desiring to form a company of volunteer guards, may meet and declare such purpose, and after obtaining consent from the governor may perfect their organization by electing their company officers in accordance with the provisions of this chapter. And it shall not be lawful for any body of men whatsoever, other than the regularly organized volunteer

guard, to associate themselves together as a military company or organization, or to parade in public with arms in any part of the state, without the license of the governor therefor. [Amendment April 5, 1889; 21 Leg. p. 12.]

**ART. 3295. What officers to be elected.**

Each company of volunteer guards shall elect one captain, one first lieutenant, and one second lieutenant, and each troop or battery such officers as the regulations shall specify or the commander-in-chief shall direct; and the commanding officer shall appoint five sergeants and four corporals, and the commanding officer of each troop or battery shall appoint such numbers of sergeants and corporals as may be specified in the regulations or the commander-in-chief may direct. [Amendment April 5, 1889; 21 Leg. p. 12.]

**2. REGIMENTAL AND OTHER ORGANIZATIONS.**

**ART. 3304. Shall be organized into divisions, etc.**

The Texas volunteer guard in time of peace shall consist of one major-general, two brigadier-generals, an adjutant-general's department, an inspector-general's department, a quartermaster's department, a subsistence department, an ordnance department, a medical department, a pay department, a bureau of military justice, and such organizations of artillery, cavalry and infantry as the commander-in-chief may direct, not to exceed three thousand men, rank and file, including all departments of the volunteer guard, and which shall be organized into battalions, regiments, brigades, and divisions of suitable size, and changed from time to time as the commander-in-chief may deem for the best interests of the service. [Amendment April 5, 1889; 21 Leg. p. 12.]

**ART. 3306. Regimental organization.**

Each regiment shall consist of not more than ten companies and a regimental band, and shall have a colonel, a lieutenant-colonel, and a major, all of whom shall be appointed and commissioned by the governor upon the recommendation of the line officers of the regiment. Each colonel shall appoint for his regiment an adjutant and a quartermaster with the rank of first lieutenant, and an assistant surgeon and a chaplain with the rank of captain of infantry. He shall appoint a sergeant-major, quartermaster and commissary sergeant, a hospital steward, and a drum-major. [Amendment April 5, 1889; 21 Leg. p. 12.]

**ART. 3307. Brigade organization.**

Each brigade shall consist of not more than five regiments, and shall be under the command of a brigadier-general, to be appointed by the commander-in-chief, and each division shall consist of not more than three brigades, and shall be under the command of a major-general, to be appointed by the commander-in-chief. [Amendment April 5, 1889; 21 Leg. p. 12.]

**ART. 3308. Staff officers, etc.**

Each major-general shall have four aides-de-camp with the rank of captain, to be appointed by him; and each brigadier-general shall have two aides-de-camp with the rank of captain, to be appointed by him. In addition thereto each major-general and each brigadier-general may appoint a quartermaster and commissary sergeant, a hospital steward and a clerk. [Amendment April 5, 1889; 21 Leg. p. 12.]

**5. PENALTIES AND THEIR ENFORCEMENT.****ART. 3318. Code of regulations to be established.**

It shall be the duty of the adjutant-general and the judge-advocate-general to prepare and submit to the commander-in-chief for his approval a code of regulations, not inconsistent with law, for the government and regulation of the volunteer guard as will increase its discipline and efficiency, which shall provide for the examination of certain military officers; shall define and regulate the punishment for military offenses, and shall provide for the regulation of courts martial and courts of inquiry; which code, upon its approval, shall form part of this law and be distributed to the various organizations, and shall take the place of and annul all company, troop, and battery constitutions and by-laws, except as may be allowed by the code. [Amendment April 5, 1889; 21 Leg. p. 12.]

**6. COURTS MARTIAL.****ART. 3327. Courts martial for certain offenses.**

For breaches of discipline, misconduct, or any other military offenses not herein provided for, non-commissioned officers, musicians, and privates may be tried by courts martial convened by the battalion or regimental commander, and may be punished by suspension, dismissal, or dishonorable discharge from the service; such courts to consist of not less than three nor more than five commissioned officers, their findings to be subject to the approval of the officer ordering the court, and their proceedings governed by the United States Army Regulations relating to courts martial. [Amendment April 5, 1889; 21 Leg. p. 12.]

**ART. 3329. Extent of punishment.**

The sentences of such courts shall not extend beyond suspension for a definite period, not to exceed twelve months, or dismissal from the service, and shall not be carried into effect without the approval of the commander-in-chief. [Amendment April 5, 1889; 20 Leg. p. 12.]

**7. REPEALING CLAUSE.**

**ART. 3329a. Articles repealed.**

Articles 3319, 3320, 3321, 3322, 3323, 3324, 3325, and 3326, chapter 4 (Militia Law), Revised Statutes, are hereby repealed. [Amendment §2, April 5, 1889; 20 Leg. p. 12.]

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**CH. 5.—ARMS, AMMUNITION, EQUIPMENTS, AND  
MILITARY STORES.**

**ARTS. 3348 to 3361. See Civil Statutes.**

## TITLE 64b.—MINES AND MINING.

ART. 3361b. (*New.*)

- §1. Mineral lands located and sold, how.
- §2. Mineral lands designated and classified.
- §3. Mining districts organized, how.
- §4. Mining claim defined.
- §5. Mining claim designated, how.
- §6. Mining claim located, how.
- §7. Development of claim; payment to the state.
- §8. Owners of tunnels, rights of.
- §9. Patents for mining land, how obtained.
- §10. Location and patent of lands containing coal, iron ore and other deposits.

ART. 3361b. (*New.*)

- §11. Adverse claim prosecuted, how.
- §12. Location of minerals in land not subject to patent.
- §13. Claims forfeited and subject to relocation, when.
- §14. Forfeiture of claim may be set aside, when.
- §15. Sale of land in mineral district, made how.
- §16. Placer claims subject to entry, etc., how.
- §17. Non-mineral lands may be included in application for patent.
- §18. Timber, etc., on mineral land; use of permitted, when.

**NOTE.**—The provisions of the Revised Statutes relating to mineral lands, and the act of April 14th, 1883, 18 Leg. p. 100, relating to mines, will be found in the Annotated Civil Statutes, under title 79, articles 3800, 3800a.

**ART. 3361b, §1. Mineral lands located and sold, how.**

All the public school, university, asylum, and public lands containing valuable mineral deposits are hereby reserved from sale or other disposition, except as herein provided, and are declared free and open to exploration and purchase under regulations prescribed by law by citizens of the United States, and those who have declared their intention of becoming such; *provided*, that all who have located and recorded claims under previous laws and have not abandoned same, but are engaged in developing same, shall have a prior preference right for thirty days after the passage of this act in which to relocate same under this act.

**§2. Mineral lands designated and classified.**

It shall be the duty of the commissioner of the general land office immediately upon the passage of this act to have a map made showing the location of all public school, university, asylum, and public lands which are unsold at that date; and it shall be the duty of the geological and mineralogical survey to examine all such lands as soon as practicable thereafter, and to designate such tracts as are apparently mineral-bearing as mineral lands for the purposes of this act. If mineral lands are afterwards claimed to exist at other locations than are so designated, they shall also be examined and classified accordingly.

**§3. Mining districts organized, how.**

It shall be the duty of the commissioner of the general land office to unite a suitable number of these mineral locations into mining districts, in each of which shall be a surveyor who must either be the surveyor of the district or county or a regularly appointed deputy, and an officer qualified to administer oaths.

**§4. Mining claim defined.**

A mining claim upon veins or lodes of quartz or other rocks in places bearing silver, cinnabar, lead, tin, copper or other valuable metals, excluding deposits of iron ore, coal, kaolin, baryta, salt, marble, fire clays, valuable building stones, oil, or natural gas, may equal but shall not exceed one thousand five hundred feet along the vein or lode. No such claim shall exceed twenty-one acres in total area. The end lines of each claim shall be parallel to each other, and all claims shall be in the form of a parallelogram or square, unless such form is prevented by adjoining rights or boundaries of the section in which the claim lies. The locator under this act shall be entitled to the use of all the superficial area between the inclosing lines of the claim, and to all minerals thereon, and between the side and end lines extending downwards vertically until the rights secured by posting are forfeited as provided, and in all conflicts priority of location shall decide.

**§5. Mining claim designated, how.**

The locators of any mining claim shall post up at the center of one of the end lines of the same a written notice, stating the name of the locator and of the claim, and the date of posting, and describe the claim by giving the number of feet in length and width, and the direction the claim lies in length from the notice, together with the section, if known, and the county; and shall place stone monuments at the four corners, and otherwise describe corners so that they can be readily found. The notice shall be placed in a conspicuous place so as to be readily seen.

**§6. Mining claim located, how.**

The locators shall, within three months after the date of posting the required notice, sink a shaft at least ten feet in depth by four feet square, or a tunnel of the same dimensions ten feet in length, or an open cross-cut twenty feet in length, four feet or more wide and ten feet in depth at its shallowest part, and shall within said time file with the county surveyor or the district surveyor of the county, as the case may be, an application in writing for the survey of their claim, which application shall be accompanied with a fee of twenty dollars, unless its tender is waived, and also with an affidavit attached thereto that the required work, signifying it, has been done, and that the locators have found valuable mineral on the claim; and the affidavit shall state the date of the first posting of the notice on the claim by the applicants; and further that the notice has not been post-dated or changed in its date. Upon receiving said application and fee the surveyor shall record the application together with the affidavit, and he shall thereupon forthwith proceed to survey said claim and forward the field-notes to the commissioner of the general land office within thirty days after filing the application, in default of which he shall pay the aggrieved

party such damages as he may sustain, and in addition thereto shall be deemed guilty of a misdemeanor, and on conviction fined not less than twenty dollars nor more than one hundred dollars; and it shall be the duty of the applicants to see that the field-notes are so returned. The fee of twenty dollars shall cover all the services provided for in this section. In all other cases enumerated in this act the fee shall be the same allowed county clerks for similar services.

**§7. Development of claim; payments to the state.**

Annually after the filing of the application for a survey as hereinbefore provided, the claimant shall, until after application is made for a patent as hereinbefore provided, do one hundred dollars' worth of work in developing each claim; but where claims adjoin, the amount of work may be done on one for all belonging to the same party. The value of such shall be estimated at what it could be contracted for at a fair cash price, but the cost of tools and implements and the expense of going to and from the mine shall not be included in said estimate. And shall in addition to this amount of work, annually pay to the treasurer of the state the sum of fifty (\$50) dollars on each and every claim filed upon, which amount shall be credited to the fund to which the land belongs upon which the claim is located; *provided*, that all amounts so paid shall be a credit upon the final payment for such land provided for in section nine of this act. Within one month after the expiration of each year, the owner shall make and file with the surveyor his affidavit, setting forth specifically what the work consists of in detail and the value thereof, and shall also file with the surveyor at the same time the receipt of the state treasurer for the amount of cash payment provided for herein or a certified copy thereof. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required in this act within the necessary time, the co-owners who have performed the labor or made the improvements, or paid the fees or other expenditures required in this act, may, at the expiration of the year in which the same is to be done, give notice in writing or notice by publication in a newspaper published in the county where the mining is, if any; if none in such county, then in the newspaper published nearest to the mine, for at least once a week for ninety days. If after such personal notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this act, his interest in the claim shall become the property of his co-workers who have made the required expenditures. An affidavit by the co-owners forfeiting the interest of such delinquent shall, when recorded in the office of the proper surveyor, be sufficient evidence of such delinquency.

**§8. Owners of tunnels, rights of.**

When a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owner of such tunnel shall have the

right of possession of all veins or lodes within two thousand feet from the face of such claim, on the line thereof, not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work in the tunnel for six months shall be considered as an abandonment of the right of all undiscovered veins on the line of said tunnel.

**§9. Patents for mining land, how obtained.**

Whenever the owners of any mining claim shall desire a patent, they shall, within five years after the filing of the application for survey, file their application for a patent upon their claim with the commissioner of the general land office, accompanied with the receipt of the state treasurer, showing that twenty-five dollars per acre has been paid by the applicant for patent to the state treasurer. No patent shall be issued in any case until the expiration of sixty days from the filing of the application. Upon filing said application, the applicant shall cause to be published for four successive weeks, one insertion each week, in some newspaper published in the county in which the mine is situated, if there be any; if not, then in some newspaper published in the nearest county to the mine in which a newspaper is published, a notice stating the fact that application has been filed for patent on the claim (or claims), describing them clearly. A copy of the printed notice with affidavit that it has been published as required by this section, and that all the requirements of this act have been complied with, shall be filed with the commissioner of the general land office before patent shall issue. After the expiration of thirty days after the last insertion of said notice, patent shall issue, unless protest has been filed.

**§10. Location and patent of lands containing coal, iron ore, and other deposits.**

Any person or association of persons qualified as required by section 1 of this act, shall have the right to locate and obtain a patent on any quantity of these lands containing deposits of coal, iron ore, kaolin, baryta, salt, marble, fire clay, oil, natural gas, or valuable building stones, in legal subdivisions of the section, not exceeding one hundred and sixty acres to an individual person or three hundred and twenty acres to an association or corporation, upon compliance with the general land law in regard to obtaining titles and with regulations of section 9, in regard to publication, etc., and the payment to the state treasurer of not less than ten dollars per acre for such lands where the same shall be situated more than ten miles from any completed railroad, and not less than twenty dollars for such lands as shall be within ten miles of such



road; *provided*, that when any association of not less than four persons shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements; *and, provided further*, that this act shall be held to authorize only one entry by the same person or association of persons under its provisions; and no association of persons, any member of which shall have taken the benefit of this act, either as an individual or as a member of any other association, shall enter or hold any other land under the provisions of this act; and no member of any association which shall have taken the benefit of this act shall enter or hold any other lands under its provisions; *and, provided further*, that nothing in this section shall be construed to authorize the sale of lands valuable for mines of gold, silver, and copper, or other minerals enumerated in section 4.

**§11. Adverse claims prosecuted, how.**

Any person desiring to contest the issuance of patent may do so by filing with the commissioner of the general land office a protest, setting forth the grounds of objection generally, and that protestant has an interest in the subject matter, which protest shall also state that the same is presented in good faith and not to injure or delay the applicants, or any of them, and the same shall be verified by affidavit; whereupon it shall be the duty of the commissioner to withhold patent until the controversy is ended; *provided*, that if the protestant shall not, within thirty days after filing his protest, institute suit in the court having jurisdiction thereof in the county where the claims are located, his protest shall constitute no further barrier to the issuance of patent. A certified copy of the petition or a certificate of the clerk of the court where suit is pending shall be sufficient evidence to the commissioner of the pendency of the suit and of the date of filing said suit. When the land in controversy lies partly in two counties, suit may be brought in either. More than one claim shall not be embraced in the same patent or application. The suits here provided for shall be entitled to precedence of trial on the docket.

**§12. Location of minerals in land not subject to patent.**

When a location has been made in land disposed of by the state since the passage of an act for disposition of minerals on the land embraced in the first section of this act, approved April 14, 1883 [*post*, Art. 3800a], if such location was made subsequent to the disposition by the state of such lands, and the locator or his assignees have not abandoned said claim, but is working it in good faith, locator and his assignees shall nevertheless be entitled to the mineral and to the use of the superficial area as in other cases; and if the case is such that the fee in the land cannot pass by patent, a

patent may issue to all the minerals in the claims, and shall be a license from the state to enter upon and work said claim and extract the mineral therefrom. In cases provided for in this section, when the fee does not pass, the price shall be twenty dollars per acre, and the locator or his assignee shall in addition pay to the owner of the land in fee the fair value of the land so taken up by his claim, and roads and fences necessary to give him ingress and egress thereto, and be liable for any damages which may result to owner of the land in fee. All other provisions of this act shall apply to said location.

**§13. Claims forfeited and subject to relocation, when.**

All claims upon which patent has not been applied for within five years next after the application for survey, or which have not been surveyed and the field-notes returned to the general land office within the time prescribed therefor as hereinbefore provided, or upon which the assessment work has not been done, an affidavit therefor, filed as provided by this act, shall be, and are, declared forfeited without judicial action of any kind and subject to location as originally, but not by any one interested in the claim at the time of forfeiture; and any location for or on behalf of any such party shall be wholly void. Whenever any such claim shall be relocated, the locators and each of them shall make affidavit that the location is made without any contract or agreement of any kind that any of the parties owning an interest in the location before relocation has or is to have any interest in the same. In all other cases where affidavit is required by this act it may be made by one or more of the parties cognizant of the facts.

**§14. Forfeiture of claim may be set aside, when.**

No claim which has been forfeited for any cause shall be subject to relocation for a period of thirty days next thereafter; and the party owning the same may apply to the land commissioner within that time for relief, and if it appear to him from the proof submitted that the forfeiture was not occasioned by the negligence of the owner, but by circumstances which he could not reasonably control, the commissioner may, within that time, in his discretion, grant relief against the forfeiture, and if he grants such relief he shall at once forward his order to that effect to the surveyor, who shall file the same for record in his office.

**§15. Sale of land in mineral district made, how.**

Whenever any application shall be made to buy or obtain title to any of the lands embraced in section one of this act, except where the application is made under this act, the applicant shall make oath that there is not, to the best of his knowledge and belief, any of the mineral embraced in this act thereon, and when the commissioner has any doubt in relation to the matter he shall forbear action until he is satisfied. And any sale or disposition of said lands

shall be understood to be with a reservation of the mineral thereon, to be subject to location as herein provided.

**§16. Placer claims subject to entry, etc., how.**

Claims usually called placers, including all forms of metallic deposits, excepting veins of quartz or rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims. All placer claims located shall conform as near as practicable with existing surveys and their subdivisions, and no such location shall include more than forty acres for each individual claimant, and shall not exceed three hundred and twenty acres for any association of persons. The price which shall be paid for such placer shall not be less than ten dollars per acre, together with all costs of proceedings as before provided.

**§17. Non-mineral lands may be included in application for patent.**

When non-mineral land, not contiguous to the vein or lode, is used by the prospector of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location of such non-adjacent lands shall exceed ten acres, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for a mill site as provided in this section.

**§18. Timber, etc., on mineral land; use of permitted, when.**

Any owner or worker of mining claim under this act is authorized to fell and remove for building and mining purposes any timber or any trees growing or being upon unoccupied lands as described in section one, said lands being mineral and subject to entry only as mineral lands, under such rules and regulations as may be prescribed for the protection of timber and undergrowth upon such lands and for other purposes. [Act March 29; July 6, 1889; 21 Leg. p. 116.]

T. 65, 66.] NOTARIES PUBLIC—OFFICERS, REMOVAL OF. Art. 3368a.

## TITLE 65.—NOTARIES PUBLIC.

ART.  
3362 to 3368. See Civil Statutes.  
3368a. Former seal validated. *New*.

ART.  
3369 to 3376c. See Civil Statutes.

### ART. 3368a. Former seal validated.

All acts of notaries public appointed by authority of the laws of the State of Texas, as evidenced by the impress of the notarial seal having the word "Texas" engraved just over the points of the star thereon, also where the word "Texas" is engraved between the points of the star, and the county of and the residence of the authenticating officer under the star or seal having the word "...county, Texas," instead of "The county of....., Texas," are hereby made as valid and binding as though the word "Texas" had been engraved on the margin of the seal, and the record of all deeds, or other instruments, which have been authenticated by the use of such seal, shall be held hereafter to be notice, and copies from the records shall be admissible in evidence the same as if the seal used had been in strict conformity with law. [Act April 5, 1889; 21 Leg. p. 121.]

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## TITLE 66.—OFFICERS, REMOVAL OF

### CH. 1.—REMOVAL OF STATE AND CERTAIN DISTRICT OFFICERS.

ARTS. 3377 to 3387. See Civil Statutes.

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### CH. 2.—REMOVAL OF COUNTY AND CERTAIN DISTRICT OFFICERS.

ARTS. 3388 to 3417. See Civil Statutes.

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### CH. 3.—REMOVAL OF CERTAIN OTHER OFFICERS.

ARTS. 3418 to 3424. See Civil Statutes.

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### CH. 4.—REMOVAL OF MAYOR AND ALDERMEN.

ARTS. 3425 to 3433. See Civil Statutes.

T. 66a, 67, CH. 1.] OFFICERS.—OFFICIAL BONDS. Arts. 3433, 3438.

## TITLE 66a.—OFFICERS; RIGHTS, POWERS AND DUTIES OF.

ART. 3433a.

§§1, 2, 3. See Civil Statutes.

ART. 3433a.

§4. Executive officer not subject to writ of *mandamus*. *Annotated*.

ART. 3433, §4. Executive officer not subject to writ of *mandamus*.

(1.) In a proceeding by *mandamus* to compel the delivery of patents, brought by the contractor, for lands earned upon the contract for building the new capitol, without the payment of patent fees, the state is a necessary party; and, as the state cannot be sued without her consent, such suit against the commissioner of the general land office was properly dismissed. *Taylor v. Hall*, 71 T. 206.

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## TITLE 67.—OFFICIAL BONDS.

### CH. 1.—THE RECORD OF OFFICIAL BONDS, AND RELIEF OF SURETIES THEREON.

ART.

3434 to 3437. See Civil Statutes.

ART.

3438. Discharge of sureties. *Annotated*.

ART. 3438. Discharge of sureties.

(2.) Upon the death of one of the sureties upon the bond of a tax collector the county commissioners ordered the execution of a new bond. A new bond was made, and approved by the county court, and was transmitted to the comptroller, and was by him rejected. The county court made no order removing the collector, and he continued in office. *Held*, the sureties on the first bond were not discharged by the proceedings looking to a new bond. [*Approving The State v. Wells*, 61 T. 562.]

A like rule exists when a new bond is ordered by the county commissioners upon their own motion as when upon application of a surety to be relieved.

Suit against heirs of one of the sureties—assets and no administration alleged, defendant only demurs, *held* not error to render judgment against the heirs, to be satisfied out of assets subject to execution. *Finch v. The State*, 71 T. 52.

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### CH. 2.—OBTAINING NEW SURETIES ON OFFICIAL BONDS.

ARTS. 3439 to 3441. See Civil Statutes.

## TITLE 67a.—OILS.

ART. 3441a. (*New.*)

- §1. Illuminating oils shall be inspected, etc., before sale.
- §2. Fire test, how made.
- §3. State inspector; appointment and duties of.
- §4. Inspection made, how.
- §5. Inspection made on request, when and how.
- §6. Sale of oil not inspected or rejected a misdemeanor.

ART. 3441a. (*New.*)

- §7. Falsely branding or refilling stamped packages a misdemeanor.
- §8. Oath and bond of inspector and deputies.
- §9. Fees for inspection.
- §10. Seller of illuminating fluids not inspected liable for damages.
- §11. Inspector shall file complaints, when. Penalty for neglect.
- §12. Dealing in illuminating fluids by an inspector a misdemeanor.

**ART. 3441a, §1. Illuminating oils shall be inspected, etc., before sale.**

No refined petroleum, kerosene, or any other illuminating fluids, in whole or in part petroleum, or any product of petroleum, be they designated by whatever name, the fire test of which is 110 degrees Fahrenheit, shall be sold or offered for sale for illuminating purposes before being first inspected and branded as hereinafter provided; *provided, however*, that any of said fluids which have been inspected and branded according to the provisions of this act shall not again be subject to inspection.

**§2. Fire test, how made.**

Said fire test shall be determined by an inspector or deputy inspector, appointed under the provisions of this act, who shall use the Foster cup or Foster's automatic oil tester, or such other well defined instrument as may be customarily used for such purpose, according to the following formula: Heat with alcohol, small flame; when the thermometer indicates ninety degrees, remove the lamp; at ninety-five degrees try for a flash with small bead of fire on end of string or small hard wooden taper held within a quarter of an inch of surface of oil; replace lamp and heat oil gradually from this point until the burning point is reached, removing lamp every four degrees and allowing oil to run up three degrees before replacing lamp, flashing oil each time just before the lamp is replaced until the result is attained. Or said fire test may be made by an inspector or deputy inspector, appointed under the provisions of this act, who shall use the Foster cup or Foster's automatic oil tester according to the directions accompanying same and prescribed by the manufacturers for the use of said tester.

**§3. State inspector; appointment and duties of.**

The governor shall appoint a suitable person, a resident of this state, who is not interested in manufacturing, dealing in, or vending any of said illuminating fluids, as state inspector of oils, and who shall not be interested in the Foster cup or other apparatus,

whose term of office shall be for two years from the date of appointment or until his successor shall be appointed and shall qualify. The state inspector, when appointed, shall by and with the consent of the governor divide the state into convenient inspection districts, which districts may, from time to time, in the same manner be changed for the purpose of facilitating inspections under this act. And the said inspector is hereby empowered to appoint a suitable number of deputy district inspectors, who shall be empowered to perform the same duties in the districts for which they are appointed, and be liable to the same penalties as the state inspector. And said inspector may, for reasonable cause, remove any of said deputies. It shall be the duty of the said inspector and his deputies to provide themselves, at their own expense, with the necessary instruments and apparatus for inspecting said fluids, and to promptly inspect the same when called upon for that purpose. And the state inspector shall adopt uniform brands for use by himself and the deputy district inspectors in branding packages containing inspected fluids, and shall adopt all reasonable rules, not inconsistent with the provisions of this act, necessary for the government of deputy inspectors in the performance of their duties, and shall have supervisory control and direction over them in all matters pertaining to the inspection of fluids. And in case of controversy between any deputy inspector and person or persons for whom the inspection shall be made by such deputy with regard to the manner and the result of making such inspection, shall determine such controversy according to the intent of this act. The said state inspector shall be authorized to make inspections of said fluids at any place within this state, and shall, in addition to the deputy district inspectors hereinbefore provided for, at his own cost and expense, appoint such other deputy inspectors to aid him in making inspections as may be necessary for the proper discharge of the duties of his office, who shall work under his immediate supervision; *provided*, that he shall be entitled to receive the inspection fees for all inspections made by him or the said deputies under his supervision, and shall be responsible on his official bond for their acts; *provided*, it shall not be necessary to inspect one which has been inspected under a law of another state.

**§4. Inspection made, how.**

It shall be the duty of the state inspector and district deputy inspectors, within their respective districts, to inspect without delay all said fluids offered for sale by any manufacturer, vendor, or dealer, as hereinbefore provided in section 2, and if upon such inspection the said fluids shall meet the requirements of said section, the inspector making the same shall fix his brand or device, viz: "Approved," with the date, over his official signature, upon the package, barrel, or cask containing the same; but if the said fluids

so inspected shall not meet said requirements, he shall fix his brand or device, viz: "Rejected for illuminating purposes," with the date, over his official signature, upon the package, barrel, or cask containing the same. And where the fluid is contained in cans, two or more of which are encased in wood, he shall also fix his brand upon the case containing such packages. To more effectually carry out the provisions of this act, it shall be lawful for the state inspector or any deputy district inspector, within his district, to enter into or upon the premises of any manufacturer, vendor, or dealer of or in said fluids, and if he finds any of said fluids that have not been inspected and branded according to the provisions of this act, to inspect and brand the same; *provided, however*, that none of said fluids while in transit in the state or for points beyond its limits, or in boats or vessels, railroad tank cars, or in store intended for export, shall be subjected to inspection hereunder except at the request of the person owning or having charge of the same.

**§5. Inspection made on request, when and how.**

It shall be the duty of the state inspector or of the deputy district inspectors, within their respective districts, when requested to do so by the owner or the person having charge of the same, to promptly inspect any of said fluids contained in bulk, storage tanks, reservoirs, railroad tanks, or wagon tanks, by making a single test in the manner prescribed; *provided*, that where such inspection is made, the inspector or his deputy making the same shall see the fluid so inspected placed in the cask, barrel, or other package in or from which it is intended to be sold, and properly brand such cask, barrel, or other package in the manner hereinbefore provided for, according to the degree of the fire test of said fluid; *and provided further*, that the terms "casks," "barrels," and "other packages," as used in this act, shall include wagon tanks.

**§6. Sale of oil not inspected, or which has been rejected, a misdemeanor.**

If any person for himself, or as agent for any other person or corporation, shall, contrary to the provisions of this act, sell, attempt to sell, or use as an illuminant within this state, any of said fluids before first having the same inspected and branded as hereinbefore provided; or shall sell or offer to sell any of said fluids to any person within this state, to be used for illuminating purposes therein, or use the same for such purpose, after the same have been inspected and branded "rejected for illuminating purposes," as hereinbefore provided, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than one hundred dollars nor more than three hundred dollars.

**§7. Falsely branding or refilling stamped packages a misdemeanor.**

If any person shall falsely brand any cask, barrel or other package provided to be branded by this act, or shall refill and use any



such cask, barrel, or other package having an inspector's brand thereon, without having the fluids therein first inspected, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than one hundred dollars nor more than three hundred dollars, or imprisoned in the county jail not exceeding six months, or both; or if any person shall sell or dispose of an empty cask, barrel, or other package which has been branded by the inspector "approved," according to the provisions of this act, before thoroughly canceling, removing, or effacing said brand from the same, he shall, upon conviction thereof, be deemed guilty of a misdemeanor and punished by a fine of not less than ten dollars nor more than fifty dollars for each cask, barrel, or other package so sold or disposed of.

**§8. Oath and bond of inspector and deputies.**

Every person appointed a state inspector or deputy inspector shall, before he enters upon the discharge of the duties of his office, take the oath of office and file the same in the office of the secretary of state. The state inspector shall execute a bond to the state in the sum of ten thousand dollars, and each deputy district inspector shall execute a like bond in the sum of five thousand dollars, both with good and sufficient sureties, to be approved by the secretary of state, conditioned for the faithful performance of the duties imposed upon them by the provisions of this act, which bond shall be for the use of all persons in any way aggrieved or injured by the act or neglect of the inspector executing the same, and the said bond shall be filed with the secretary of state.

**RECORDS AND REPORTS.** It shall be the duty of the inspector and deputy district inspectors to keep true and accurate records of all oils inspected and branded by them, which record shall state the date of inspection, the number of gallons rejected, the number of gallons approved, the number of gallons inspected, the names of the persons for whom inspected, the number and kind of casks, barrels, or packages inspected, and the money received for such inspection. It shall also be the duty of every deputy district inspector, on the first of each month, to forward to the state inspector a copy of such records kept by him for the preceding month; and in the month of January in each year the state inspector shall make and deliver to the governor of the state a report containing an aggregate of the records kept by him and of said reports, which said records and reports in the hands of said state inspector, deputy district inspectors, and governor, shall at reasonable times be open to the inspection of the public.

**§9. Fees for inspection.**

The inspector and each deputy district inspector shall be entitled to demand and receive from the owner or party calling upon him or for whom he performs the inspection, the following fees, which

shall be a lien upon the fluids and packages inspected, to-wit: For less than one hundred gallons, one dollar; and for any quantity from one hundred gallons inclusive and upwards, one cent per gallon inspected in single wagon tanks, in single casks or barrels, or other packages, whether of wood, iron, tin, or other material containing twenty-five gallons or more; and in cases containing two or more cans or vessels, two dollars and fifty cents for one hundred gallons or less; and one and one-half cents per gallon for all quantities inspected over and above one hundred gallons; this shall apply to all case oil used for illuminating purposes put up in cans of less than twenty-five gallons capacity.

**§10. Seller of illuminating fluids not inspected liable for damages.**

Whoever sells or keeps for sale to be consumed in this state any of said fluids not inspected as provided for in this act, shall be responsible to the party or parties injured for any violation of the provisions of this act by himself or by any clerk or person in his employ in the sale of such oil.

**§11. Inspectors shall file complaints, when; penalty for neglect.**

It shall be the duty of said inspector and deputy district inspectors who know of any violation of the provisions of this act to enter complaint before any court of competent jurisdiction against any person so offending; and in case said inspector or deputy inspectors, having knowledge of any violation of this act, neglect to enter complaint as required by and provided for in this act, shall be fined in any sum not to exceed five hundred dollars, and shall be removed by the court trying the case from his position as such inspector or deputy inspector.

**§12. Dealing in illuminating fluids by an inspector a misdemeanor.**

No state inspector or deputy inspector shall, while in office, traffic, directly or indirectly, in any article in which any of said fluids is a constituent part, which he is appointed to inspect; and in case of the violation of the provisions of this section by any state inspector or deputy inspector, he shall be fined in any sum not exceeding five hundred dollars, and shall be subject to removal from office. [Act April 5; July 6, 1889; 21 Leg. p. 122.]

## TITLE 68.—PARTNERSHIP, LIMITED.

## ART.

3442 to 3463. See Civil Statutes.

## ART.

3464. General principles relating to partnership. *Annotated.*

## ART. 3464. General principles relating to partnership.

(1.) The effect of a sale of an undivided interest of partnership assets by one of the firm is a dissolution of the partnership, and the purchaser, in the absence of special contract to the contrary, becomes a joint owner of the property.

A partner who thus sells, and in the sale treats the partnership property as though all equities between himself and partners were settled, and appropriates to himself what would have been his interest if all partnership debts had been paid, is estopped from setting up claims against the interest of his former partner in the firm assets for reimbursements on account of advances made, or firm debts paid by him. *Moore v. Steele et al.*, 67 T. 435.

(3.) The widow of a deceased husband, who at the time of his death owned with his wife as community property a stock of goods, continued without administration to carry on a mercantile business under the old name with the consent of the husband's heirs, the widow receiving the profits, and some of them assisting in the business and holding themselves out to the world as being interested in it—the stock was from time to time replenished—afterwards administration on the estate was begun, and a creditor who had furnished goods after the husband's death sued the widow and children as partners, and garnished the administrator; *held*:

1. For debts contracted in keeping up the mercantile business, the property of the widow and of those heirs engaged in conducting it, was liable, whether it consisted of the stock in trade or other means.

2. The court should have ascertained what effects held by the administrator belonged to the deceased husband at the time of his death, and what had been since acquired by defendants. As to the former the garnishee could not be charged as they were to be administered under orders of the county court. As to the latter they formed no part (presumably) of the estate of the deceased, and unless it be clearly shown that they were acquired with the property of the deceased, by exchange or purchase, they would be liable to plaintiff's garnishment. *Cleveland v. Harding et al.*, 67 T. 396.

(4.) A banking house brought suit against P. on a note executed by him, and joined B. as a defendant, alleging that P. & B. were partners in the cattle business, and that the note was given for a partnership debt. P., who had been acting as B.'s agent in purchasing and selling cattle, under a salary, received from B. on settlement sixteen thousand five hundred dollars, advanced under a contract as follows: P. was to purchase cattle and take care of them until sold, using the money for that purpose. B. was to receive back after final sale the money advanced, and the net profits, if any, were to be divided equally. If there were no net profits after deducting the money to be used in purchasing and taking care of the stock, then P. was to receive nothing. The one-half of net profits were to be retained by P. in lieu of the salary he had formerly been paid. The cattle were to be branded in the V brand, claimed by B., but without B.'s knowledge were recorded in P.'s name. P. was not to pay prices greater than those directed by B., and not to sell for less than prices that B. specified. B. did not think he was forming a partnership; did not know in whose name the cattle business was carried on; there was no agreement regarding the name under which the business was to be carried on. But he did know that the money arising from sales was deposited in P.'s name. The note sued on was executed in renewal of another for the money advanced by the bank to enable P. to carry on the cattle business, and it was expended chiefly in buying cattle which were branded V. The advances of money were made on P.'s representations that the money would be used in the cattle business, and relying on B.'s solvency. P. represented himself as B.'s partner, and drew drafts in the name of P. & B., but B. had no knowledge of this, nor had the bank when it advanced the money. It was sought by the petition to hold B. responsible as partner and not as P.'s principal in an agency. On the above state of facts, *held*:

1. Where one furnishes money to another under an agreement that he who receives it as agent for the owner is to use it in a designated business and receive a part of the net profits as compensation for his services, he who thus receives the money is not thereby constituted a partner of him who advances it.

2. The doctrine above advanced, held in *Cox v. Hickman* (8 H. L. C., 268), reversing former English decisions during half a century, and was finally incorporated in the act of 28 and 29 Victoria, C. 86.

3. B., whether liable as principal for the act of P. as his agent or not, was not liable under the facts as above stated as P.'s partner.

[*Cothran v. Marmaduke & Brown*, 60 T. 370; and *Goode v. McCartney*, 10 T. 193, reviewed.]

[*Ford v. Smith*, 27 Wis. 267; *Richards v. Green*, 13 Iowa, 44; *Redick v. Otis*, 33 Iowa, 402; *Colwell v. Britton*, 54 Mich. 26, and other cases referred to in the opinion, and approved.] *Buzard v. Bank of Greenville*, 67 T. 85.

(11.) A retiring partner can only relieve himself from liability for debts thereafter incurred in the firm name by giving express notice to all persons dealing with the firm, and the world in general, of the dissolution of the partnership. *Dunham, Buckley & Co. v. Simon*, 1 U. C. 548.

(13.) A partner may bind his firm by the release of a debt due the partnership of which he is a member, if the debtor has neither knowledge nor notice that the partner is acting in violation of his obligation and duties to the firm, or for purposes disapproved of by the firm, or in fraud of its rights.

The mere fact that a partner has executed a release without the consent, or even against the opposition of his co-partners, and that this is known to the party who accepts the release, will not of itself justify the conclusion that the release was fraudulent. *Stout et al. v. Bank*, 69 T. 384.

(15.) A bond executed in a partnership name, which does not pertain to the ordinary business of the firm, or in settling up its affairs, which is executed by one member of the firm without the knowledge or consent of the others, and when nothing has been done by the other partners that would estop them from denying the authority, will not bind the firm. A subsequent ratification will supply authority.

When the firm name is used as surety for a third person the presumption prevails that such use is outside of the firm business.

See opinion for charge of court regarding the liability of a partnership held not applicable to facts stated in the opinion and misleading. *Fore et al. v. Hitson et al.*, 70 T. 517.

(57.) It is the right of a partner to have the partnership indebtedness satisfied from the partnership assets before a division can be had. The interest of each partner is confined to what may be left after liquidating all debts of the firm, and in the payment of such debts each partner is, as between himself and the others, entitled to retain, before a division of assets, all sums advanced by him beyond his share of the capital, and sufficient to reimburse him for debts of the firm paid by him. *Moore v. Steele et al.*, 67 T. 435.

(68.) Articles of co-partnership stipulated that in case of the absence of one of the parties the other should conduct its affairs, but the partner so managing the business should have no right, without the consent of the absent partner, to incur the firm with a debt "exceeding its cash assets." One of the partners left the state and was absent several years. Held: 1. That the partner who remained and gave his time and attention to the partnership business was not compelled—if there was no money on hand to meet necessary expenses—to defray the same from his separate means. 2. The clause must be construed as intending to inhibit the partner from creating debts in the purchase of property in order to enlarge the partnership operations. *Richie v. Levy*, 69 T. 133.

## TITLE 69.—PARTITION.

## CH. 1.—PARTITION OF REAL ESTATE.

## ART.

3465. Joint owners may compel partition. *Annotated.*

3466. Petition for, and what it shall state. *Annotated.*

3467, 3467a. See Civil Statutes.

3468. Court shall determine what. *Annotated.*

3469. Decree. Appointment of commissioners. *Annotated.*

## ART.

3470 to 3475. See Civil Statutes.

3476. Shall divide real estate, how. *Annotated.*

3477 to 3481. See Civil Statutes.

3482. Each party shall hold in severalty, etc. *Annotated.*

3483. Decree of court shall vest title. *Annotated.*

## ART. 3465. Joint owners may compel partition.

(1.) There can be no partition between an owner and one having no interest; whatever be the form of the instrument attempting it, neither party loses or acquires anything. The basis of partition is co-ownership, and without it the instrument of partition is void. *Davis et al. v. Agnew*, 67 T. 206.

(2.) A parol partition of land is valid when a wife, having an interest in land, gave her consent in a written instrument, joined by her husband, to a partition thereof, accepted the land allotted to her, and clearly manifested by her acts an intention not to avoid the partition; the fact that the written instrument was not signed in the manner regulating the conveyance of the property of married women was immaterial. *Wardlow v. Miller*, 69 T. 395.

After seven years' acquiescence, by parties in interest, to a verbal partition of land, fairly made, and under which the parties have held possession in severalty of the parcels allotted, the partition was held valid and conferred title. *Mitchell v. Allen*, 69 T. 70.

A purchaser, claiming under a voluntary partition, is not affected by a mistake made by one of the parties thereto as to the extent of his interest in the property partitioned, though the facts recited in the paper, which evidences the partition, may show that such party was entitled to a larger interest in the land than he consented to receive. The purchaser, while chargeable with notice that the party had received less than his share, would not be charged with notice as to whether the party was mistaken as to his legal rights. *Wardlow v. Miller*, 69 T. 395.

In the absence of evidence showing that those in interest, who were not parties to a partition of land, assented to the partition made, or participated in it, such partition is, as to them, a nullity. *House v. Brent*, 69 T. 27.

Two tenants in common in a tract of land made a parol partition. After the partition one leased a building lot for a term of years, receiving rents therefor. The right of the other was sold under execution, the purchaser having no notice of the partition. The holders of the term were in possession of the lot at the execution sale. In suit by such purchaser, held:

1. That the partition was valid between the owners.

2. That the lessees under one, after the partition, were protected under the partition; and,

3. A purchaser, while the lessees were in possession under the lease, was chargeable with notice of the partition to the extent necessary to protect the lessees, etc., that on recovery by the execution purchaser, it was error to allow rents against the lessees so holding.

A lessee occupying land held in common under license from one of the owners in tenancy in common, is not liable to be charged with rent at suit of another tenant in common. *Whittaker v. Allday*, 71 T. 623.

A license by parol by one party to the other, being interested in a disputed division line, to occupy part of the land in dispute to a designated line, is not equivalent to an agreement upon such line as a division line. *Wright v. Lassiter*, 71 T. 640.

(6.) Until the close of administration, the county court has conclusive jurisdiction to decree a partition of the lands of an estate, when the title, as between

the distributees, is clear, and no other party claims an interest adverse to the heirs. *Branch v. Hanrick*, 70 T. 731.

**ART. 3466. Petition for, and what it shall state.**

(7.) In a suit for petition every one having an interest in the property must be made parties to the suit; and if all are not made parties, the decree rendered in such proceeding is not binding even on those before the court.

If, in the course of the trial of a suit for partition, it becomes apparent that there are necessary parties not before the court, the case should be stopped and the parties brought in before rendering a decree. A decree of partition is not binding on the parties to it, unless they represent the whole of the estate. *Franks v. Hancock*, 1 U. C. 554.

One who buys land by metes and bounds from an heir, with knowledge of a division between the heirs and their ancestor's widow, by which the widow received as her community interest a particular half of the survey, has no right, in a partition suit by one of the heirs, to complain, because the widow's half is not included in the suit. *Franks v. Hancock*, 1 U. C. 554.

**ART. 3468. Court shall determine what.**

(2.) In a suit for partition the title was put in issue, defendants claiming separate parts of the land through a common vendor. An equity existed in favor of the common vendor which he assigned to one of the defendants, who pleaded the facts and asked relief. The other defendants pleaded not guilty. The facts supporting the equity were excluded. The judgment secured the defendant, holding the equity and pleading it in all of the land he claimed, on appeal by the other defendants, held (1) that as the appellants had no pleadings to which the testimony was relevant, they could not complain at the exclusion of the testimony, and (2) that the defendant who pleaded the facts could not complain, having judgment in his favor for all he claimed. *Peik v. Brinson*, 71 T. 310.

**ART. 3469. Decree; appointment of commissioners.**

(1.) In a suit for partition, the jury are not authorized to prescribe in the verdict how lands shall be divided. The verdict ascertains the rights of the parties. Decree for partition follows. Commissioners divide according to the decree, subject to approval of the court. *Reed v. Howard*, 71 T. 204.

**ART. 3470. Shall divide real estate, how.**

(2.) A sale by one tenant in common of a distinct part of a large tract of land will be protected, and the part so sold set aside to the vendee, when it can be equitably done, if it does not exceed the share to which the co-tenant vendor was entitled.

In a proceeding to repartition land by one who claims, and is entitled to a larger proportion of the entire tract than was set aside to him in the former partition, which was effected during his infancy, and whose right is based on a title not adjudicated in the former proceedings, the share to which he is entitled must be obtained by pro rata contributions from those co-tenants who had received more than their just proportion of the land. *Peak v. Swindle*, 68 T. 242.

**ART. 3482. Each party shall hold in severalty, etc.**

(1.) One who conveys by deed the interest in land set apart to him in partition between himself as an heir of his father, and other heirs of his father, is not estopped thereby from asserting title to a larger interest in the same land inherited from his mother, who was not a party to the proceedings and the interest of whose estate was not adjudicated therein.

A warranty is implied in cases of compulsory partition between tenants in common, yet, whatever may be the rule since the adoption of the Revised Statutes (Art. 3483), such implied warranty is not equivalent, as to the measure of right secured, with a general warranty created by a deed which evidences a purchase and sale. Thus the warranty which is implied in compulsory partition between heirs extends only to the title under which each received his distributive interest, and does not include an interest in one of the parties existing by virtue of a title not asserted in the partition proceedings, and which was never adjudicated therein.

A partition is based on the assumption that the parties thereto own the thing partitioned. It is to protect those who in partition receive that which was not owned in common, that an implied warranty exists, and it can be regarded only so far as may be necessary to give such protection.

T. 69, CHS. 2, 3; T. 70.] PARTITION—PAWNBROKERS. Arts. 3483, 3493.

The implied warranty in partition only enables that party whose title to his allotted share of land fails, to enforce contribution in pro rata value of what was really owned, or, in repartition, from those who were allotted the common property; he cannot recover from them the value of his share as formerly allotted. The warranty embraced in a deed of conveyance secures a different and more extensive measure of right. *Grigsby v. Peak*, 68 T. 235.

ART. 3483. Decree of court shall vest title.

(3.) One who purchases land allotted to one of several joint owners at the term of court when a decree of partition is entered determining the interest of each owner, and after the entry of such decree, must be held to have purchased with notice that the court could exercise its authority to alter its judgment at any time during the term, on proper notice. If such vendor had no notice of a motion to revise and change the decree, still his vendee would be concluded by his subsequent appearance to contest the motion to change the decree, and a judgment changing the decree would be conclusive of the rights of the purchaser to the extent of such change, and could not be disturbed in a collateral proceeding. *Sharp v. Elliott*, 70 T. 666.

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## CH. 2.—PARTITION OF PERSONAL PROPERTY.

ARTS. 3484 to 3489. See Civil Statutes.

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## CH. 3.—MISCELLANEOUS PROVISIONS.

ART.  
3490 to 3492. See Civil Statutes.

ART.  
3493. Costs to be adjudged, how. *An-  
notate*

ART. 3493. Costs to be adjudged, how.

(1.) It is not error to award execution against parties taking in partition in decreeing partition. That parties so taking as heirs are also parties as legal representatives does not prevent such order. *Peak v. Brinson*, 71 T. 310.

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## TITLE 70.—PAWNBROKERS.

ARTS. 3494 to 3510. See Civil Statutes.

## TITLE 71.—PENITENTIARIES AND CONVICTS.

### CH. 1.—OF THE PENITENTIARY BOARD.

ARTS. 3511 to 3520. See Civil Statutes.

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### CH. 2.—OF THE SUPERINTENDENT AND HIS DUTIES.

ARTS. 3521 to 3531m. See Civil Statutes.

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### CH. 3.—OF THE PHYSICIAN AND HIS DUTIES.

ARTS. 3532 to 3542. See Civil Statutes.

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### CH. 4.—OF THE CHAPLAIN AND HIS DUTIES.

ARTS. 3543 to 3548. See Civil Statutes.

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### CH. 5.—OF UNDER OFFICERS AND EMPLOYEES.

ARTS. 3549 to 3552. See Civil Statutes.

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### CH. 6.—OF THE TREATMENT OF CONVICTS AND PRISON DISCIPLINE.

ARTS. 3553 to 3563. See Civil Statutes.

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### CH. 6a.—OF SALARIES OF PENITENTIARY OFFICERS.

ARTS. 3564 to 3566b. See Civil Statutes.

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### CH. 7.—OF VISITS TO THE PENITENTIARIES.

ARTS. 3567 to 3569. See Civil Statutes.

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### CH. 8.—OF LABOR IN THE PENITENTIARY.

ARTS. 3570 to 3584a. See Civil Statutes.



## CH. 9.—OF WORKHOUSES AND COUNTY CONVICTS.

**ART.**

3585 to 3596. See Civil Statutes.  
3597. Convicts to receive credit for labor. *Amendment.*

**ART.**

3598 to 3601. See Civil Statutes.

### ART. 3597. Convict shall be credited for his labor.

When a convict who has been committed to jail in default of payment of fine and costs is required to do manual labor he shall be credited upon such fine and costs at the rate of fifty cents for each day he may labor, and upon satisfaction of such fine and costs in full at said rate he shall be discharged; *provided*, such work shall be performed on public streets or roads, or on county poor farms. No convict under this act shall ever be required to work or be hired for more than one year. [Amendment March 7, 1889; 21 Leg. p. 14.]

## CH. 10.—OF HIRING COUNTY CONVICTS.

ARTS. 3602 to 3609. See Civil Statutes.

## CH. 10a.—OF THE HOUSE OF CORRECTION AND REFORMATORY.

**ART. 3609a.**

§§1 to 10. See Civil Statutes.

§11. Government of house of correction vested, how. *New.*

§12. Board of control; appointment of trustees, etc. *New.*

§13. Meetings of trustees; reports. *New.*

§14. By-laws, rules and regulations made, how. *New.*

§15. Superintendent; appointment, qualification and salary of. *New.*

§16. Powers and duties of superintendent. *New.*

§17. Supplies furnished, how. *New.*

§18. By-laws shall provide for commutation of time. *New.*

**ART. 3609a.**

§19. Mechanical industries established; white and colored inmates kept separate. *New.*

§20. Subordinate officers, teachers, etc., employed. *New.*

§21. Who shall be confined; governor may restore legal rights. *New.*

§22. Judgment on conviction of a person not more than sixteen years of age. *New.*

§23. Inmate to be provided with clothing, etc.

§24. Escaped inmate to be apprehended, etc. *New.*

§25. Person aiding escape of an inmate guilty of felony. *New.*

### ART. 3609a, §11. Government of house of correction and reformatory vested, how.

The government of the house of correction and reformatory, established at Gatesville, in pursuance to an act of March 29th, A. D. 1887, shall be vested in the governor, a board of control, who shall be known as trustees, and a superintendent, as hereinafter provided. [§1, Act April 2, 1889; 21 Leg. p. 95.]

**§12. Board of control; appointment, qualification and compensation of trustees.**

Said board of control shall consist of three trustees, to be appointed by the governor with the advice and consent of the senate, and shall hold their offices for the term of two years, unless sooner removed by the governor; *provided*, that such trustees, before entering upon the discharge of their duties, shall take the constitutional oath of office. Such trustees shall each receive the sum of five dollars per day and their actual expenses while engaged in the performance of their duties, for which the comptroller shall issue his warrant, on their verified accounts, approved by the governor, and two members thereof shall constitute a quorum for the transaction of business; *provided*, they shall not receive more than one hundred and fifty dollars per annum each. [§2, *id.*; see Civil Statutes, Art. 3609a, §3.]

**§13. Meetings of trustees; reports.**

Said trustees shall hold stated quarterly meetings at the reformatory, and shall convene at the seat of government, or at said reformatory, in cases of emergency, when thereto called by the governor. It shall be their duty to make full and complete quarterly reports in writing to the governor, covering all the transactions at such meetings and during the preceding quarter, and on or before the 30th day of November of each year to make an annual report in writing to the governor, covering all transactions since their last annual report, fully exhibiting the condition of the institution, together with such suggestions as to the control, government, and management thereof as they may deem necessary or requisite to the interest thereof. [§3, *id.*; see Civil Statutes, Art. 3609a, §3.]

**§14. By-laws, rules and regulations made and enforced, how.**

It shall be the duty of said trustees to take control and supervision of the reformatory, and in this connection they shall elect one of their members chairman at their first meeting, and prescribe rules respecting the conduct of their meetings and business; and at the same meeting they shall formulate a set of by-laws, rules, and regulations for the economic and efficient government and control of said reformatory and house of correction, having in view the objects to be accomplished by the establishment thereof, which by-laws, rules, and regulations shall be reported to the governor for his approval, or for his amendment and approval, and when so approved, or amended and approved, the same shall become binding and of obligatory force upon the trustees, superintendent, subordinate officers, employes, and inmates of said institution, and it shall be the duty of the trustees to see to the enforcement thereof, and of the laws of the state in relation to said house of correction and reformatory. [§4, *id.*; see Civil Statutes, Art. 3609a, §3.]

**§15. Superintendent; appointment, qualification and salary of.**

The governor shall appoint a superintendent, who shall be financial agent for said reformatory and house of correction, and who shall receive for his services the sum of eighteen (\$1,800) hundred dollars per annum to be paid quarterly on the comptroller's warrant, based on a verified account approved by the trustees. Such superintendent shall, before entering upon the duties of his office, take the oath of office prescribed by the Constitution, and shall give a bond with two or more good and sufficient sureties to be approved by the governor, in the sum of ten thousand dollars, payable to the governor and his successors in office, conditioned for the faithful discharge of the duties of his office, which bond, when so approved, shall be deposited in the office of the secretary of state. [§5, *id.*; see Civil Statutes, Art. 3609a, §4.]

**§16. Powers and duties of superintendent.**

The superintendent shall have the entire control and management of the house of correction and reformatory, subject to the authority established by law and the by-laws, rules, and regulations adopted by the trustees.

(a) It shall be the duty of the superintendent to keep a register in which he shall enter the reception, previous moral character, habits, and education, so far as can be ascertained, and the discharge, death, escape, commutation of time, and punishment inflicted on each person committed to the house of correction and reformatory.

(b) It shall be his duty to obey and carry out all written orders and instructions which he shall from time to time receive from the board or from the governor.

(c) He shall reside at the house of correction and reformatory, and be held responsible for the strict enforcement of the laws, by-laws, rules, and regulations and written orders of the trustees and of the governor; he shall see that the buildings are kept in good condition and that good order be observed in all departments.

(d) He shall take the proper measures to promote the healthfulness and cleanliness of the house of correction and reformatory.

(e) He shall keep the books of the reformatory, fully exhibiting all moneys received and disbursed, the source from which received, and the purposes for which the same were expended. Said books shall at all times be open to the inspection of the trustees or of the governor, or any one appointed by the governor or the trustees to make such inspection.

(f) Said superintendent shall make full quarterly reports in writing under oath to the governor, showing in detail the fiscal operations of the reformatory since his last report; and it shall also be his duty to make an annual report of like character to the gov-

error, on or before the 30th day of November of each year, covering in detail all the fiscal operations of the reformatory for the year last past.

(g) He shall purchase all materials and supplies and disburse all moneys appropriated therefor, and shall sell all products raised and all articles manufactured by the inmates, and shall deposit all money realized from the sale thereof in the treasury of the state, taking the treasurer's certificate of deposit therefor. [§6, *id.*; see Civil Statutes, Art. 3609a, §§4, 5.]

**§17. Supplies furnished, how.**

All supplies for the house of correction and reformatory which are not therein produced or manufactured shall, so far as can be done advantageously to the state, be procured from the state penitentiaries, under such rules and regulations as the trustees and governor may provide; and the laws, rules, and regulations of said penitentiaries, and the laws relating to and defining the mode and manner of furnishing supplies to the asylums, shall apply to and be complied with in procuring such other supplies as may be needed; and no officer of the house of correction and reformatory shall in any manner be interested in any contract made therefor. [§7, *id.*; see Civil Statutes, Art. 3609a, §§4, 5.]

**§18. By-laws shall provide for commutation of time, etc.**

The by-laws herein provided for shall prescribe rules for the liberal commutation of time to be earned by the inmates for good behavior, and for apprenticing the inmates by the trustees, after a reasonable period of confinement, when deemed for the best interest of the house of correction and reformatory and the inmates, and for a term not longer than the time for which they were committed, and for tickets of leave, and for reasonable recreation, and for instruction in reading, writing, arithmetic, and habits of industry, sobriety, and in useful arts or trades; but the specification of any subject to be embraced in the by-laws shall not be construed as a limitation of the power of the trustees to make other rules, regulations, and by-laws, as provided for in previous sections of this act. [§8, *id.*]

**§19. Mechanical industries established; white and colored inmates kept separate.**

In connection with said house of correction and reformatory there shall be established such mechanical industries as the board of trustees may deem proper and advisable, and the inmates shall be placed at such work as the superintendent shall designate; and the trustees shall especially provide that the white and colored inmates shall be kept, worked, and educated separately. [§9, *id.*]

**§20. Subordinate officers, teachers, etc., employed.**

The superintendent shall employ, with the advice and consent of the trustees, such subordinate officers, teachers, and employes as the governor and trustees shall determine are requisite and necessary to the due conduct and administration of said house of correction and reformatory, whose salaries shall be fixed by the trustees with the approval of the governor. [§10, *id.*]

**§21. Who shall be confined; governor may restore legal rights to convicts.**

In said house of correction and reformatory shall be confined all convicts heretofore transferred thereto or heretofore provided by law to be transferred from the penitentiaries of this state, and all male persons under sixteen years of age who shall hereafter be convicted of a felony in any court in this state, whose term of confinement shall not exceed five years; *provided*, said convicts confined in said house of correction and reformatory shall be required to wear such uniform as may be adopted by the trustees; *and, provided*, no uniform shall be prescribed similar to that now worn by the convicts in the penitentiaries. It shall be the duty of the governor, upon the recommendation of the trustees and superintendent of said house of correction and reformatory, for good behavior and exemplary moral conduct during confinement, to restore to such convicts all their legal rights at the expiration of their respective terms of servitude. [§11, *id.*; see Civil Statutes, Art. 3609a, §6.]

**§22. Judgment on conviction of a person not more than sixteen years of age.**

When upon the trial and conviction of any person in this state of a felony it is found by the verdict of the jury that the defendant is not more than sixteen years of age, and the verdict of conviction is for confinement for five years or less, the judgment and sentence of the court shall be that the defendant be confined in the house of correction and reformatory instead of the penitentiary, for the term of his sentence, and that such defendant be conveyed to the house of correction and reformatory by the proper authority, and there confined for the period of his sentence; and for such service such officer shall be paid the same fees he would be allowed for carrying such convicts to the penitentiary; *providing*, the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary. [§12, *id.*; see Civil Statutes, Art. 3609a, §7.]

**§23. Inmate to be provided with clothing, etc., on discharge.**

Upon the discharge of any person so committed to said house of correction and reformatory, the superintendent shall provide them.

with a suit of suitable clothing and five dollars in money, and procure transportation for them to their homes, if resident of this state, or to the county in which they may have been convicted, or to such other place in the state at which said discharged inmate may have procured employment, at his option; *provided*, that such transportation shall not exceed that to the point from which said convict was convicted. [§13, *id.*; see Civil Statutes, Art. 3609a, §9.]

**§24. Escaped inmates to be apprehended and returned.**

If any person confined in the house of correction and reformatory shall escape therefrom, it shall be the duty of the sheriff or peace officer to apprehend and detain him, and to report the same to the superintendent of the house of correction and reformatory, and they shall be returned in the same manner and under the same laws as are provided for the return of convicts escaped from the penitentiaries. And it shall be lawful for any person to apprehend such escaped inmate, and it shall be the duty of any person who apprehends such escaped inmate to immediately deliver him to the sheriff or nearest constable of the county where such arrest has been made, who shall retain him until returned as hereinbefore provided. [§14, *id.*]

**§25. Persons aiding in the escape of an inmate guilty of a felony.**

Any person who shall knowingly assist any inmate lawfully confined in the house of correction and reformatory to escape, or who shall furnish such inmate with money, arms, or any character of means with the purpose of facilitating the escape of such inmate, shall be deemed guilty of a felony, and upon conviction thereof shall be confined in the penitentiary for a term of not less than two nor more than five years. [§15, *id.*]

## TITLE 72.—PENSIONS.

ART.  
3610. Who are entitled to pensions.  
Amendment.  
3611. Application for pension. Amend-  
ment.

ART.  
3612 to 3620. See Civil Statutes.  
3621 to 3624. Repealed. See Civil Stat-  
utes.

**ART. 3610. Pensions granted to indigent soldiers.**

To every surviving indigent soldier or indigent volunteer who was in the actual military or naval service of Texas at the time of the siege of Bexar, in December, 1835, or at the time of the battle of San Jacinto, in April, 1836, or who actually participated in any battle in Texas in 1836, or who was in such actual military service for as much as six weeks between the commencement of the revolution at Gonzales in 1835, and the first day of January, 1837, and to every indigent surviving signer of the declaration of the independence of Texas, and to every indigent surviving widow of any such soldier, volunteer, or signer, who is and has always been unmarried since the death of such soldier, volunteer, or signer, and so long as such widow may remain unmarried, there shall be, and is hereby, granted an annual pension of one hundred and fifty dollars as hereinafter provided. [Amendment April 4; July 6, 1889, §1; 21 Leg. p. 43.]

**ART. 3611. Application for pensions.**

Each applicant for a pension under this act shall make application in writing for the same to the county judge of the county of his or her residence, and shall post a copy of such application on the court-house door of the county for at least thirty days before the application is acted on by the county judge. Such application shall state the name, age, and residence of the applicant, whether or not this applicant received any pension or veteran donation land certificate under any previous law, a list of the real and personal property owned by the applicant, and the present value of the same, and what property and the value thereof that such applicant has sold or conveyed within twelve months prior to the date of such application; and shall further state that the applicant is in indigent circumstances, and is dependent upon his or her labor or on the charity of others for a support; *provided*, that the word "indigent," within the meaning of this act, shall not allow the ownership of property to exceed one thousand dollars; and that the applicant has not transferred to others any property or values of any kind for the purpose of becoming a beneficiary under this act; and still further, that such applicant is and was for one year preceeding the date of the passage of this act a *bona fide* resident citizen of this state. And in addition to the foregoing, each male applicant shall further state the time he rendered such service and the command he served

in; and each female applicant shall state the name of her deceased husband, the date of his death, that she is unmarried and has so remained since the death of the husband for whose services she claims a pension; and shall further state, as accurately as she can, the time her said deceased husband rendered such service and the command he served in. Should the applicant be a signer of such declaration of independence, or a widow of such signer, he or she shall state all that is hereinbefore required, except as to the military service, and in lieu of which it shall state that the applicant was a signer of such declaration of independence, or is the widow of such signer, which application shall be subscribed and sworn to by the applicant, and the same shall be supported by affidavits of at least two credible witnesses who reside in the state, and shall show that the facts stated by the applicant\* is known and regarded in his or her neighborhood as a Texas veteran or signer of the declaration of independence, or the widow of a Texas veteran or signer of the declaration of independence. Any veteran whose application and proof heretofore made to the comptroller are in compliance with the requirements of this act shall be entitled to his or her pension on presenting such application and proof to the comptroller, without further proof being made; and where such application and proof has been returned to the applicant by the comptroller, said applicant may refile the same as if made under this act; *providing*, that such application has not heretofore been declared fraudulent. [Amendment April 4; July 6, 1889, §2; 21 Leg. p. 43.]

(\*) An examination of the enrolled bill, on file with the secretary of state, shows that it is the same as here printed. If, between the words "applicant" and "is" the following words are inserted, "are true, and that the applicant," the sense will be preserved.

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## TITLE 73.—PHYSICIANS.

ARTS. 3625 to 3638. See Civil Statutes.

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## TITLE 74.—PILOTS.

### CH. 1.—COMMISSIONS OF PILOTS.

ARTS. 3639 to 3644. See Civil Statutes.

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### CH. 2.—BRANCH PILOTS AND PILOTS FOR MOUTH OF BRAZOS RIVER AND MATAGORDA AND LAVACA BAYS.

ARTS. 3645 to 3659. See Civil Statutes.

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## TITLE 74a.—PHARMACY, PRACTICE OF.

ART. 3624a. (*New.*)

- §1. Pharmacists only shall compound medicines, etc.
- §2. Qualifications of a pharmacist.
- §3. "Graduate," term defined.
- §4. Assistants in pharmacy, qualifications of.
- §5. Board of pharmaceutical examiners.
- §6. Meetings of board of examiners, duties of.
- §7. Registrar of pharmacy, duties of.
- §8. Examination of applicants; certificate of registration.
- §9. Graduates shall be registered.
- §10. Persons exempt from examination shall register.

ART. 3624a. (*New.*)

- §11. Certificate of registration shall be posted in place of business.
- §12. Person illegally acting as pharmacist may be fined.
- §13. Person fraudulently procuring registration guilty of a misdemeanor.
- §14. Temporary certificate issued, when and how.
- §15. Act given in charge to grand jury.
- §16. Act does not apply to certain cities and towns.
- §17. Physicians and proprietors not within the act.

**ART. 3624a, §1. Pharmacists only shall compound medicines, etc.**

It shall be unlawful for any person, unless a qualified pharmacist within the meaning of this act, to open or conduct any pharmacy or store for compounding medicines, or for any one not a qualified pharmacist to prepare physicians' prescriptions or compound medicines, except under the direct supervision of a qualified pharmacist as hereinafter provided.

**§2. Qualifications of a pharmacist.**

Any person, in order to be qualified, shall be twenty-one years old and shall have passed a satisfactory examination before the board of pharmacy of Texas, or shall be a graduate in pharmacy or an assistant in pharmacy.

**§3. Graduate, term defined.**

Graduates in pharmacy shall be such as have obtained a diploma from a regular incorporated college of pharmacy, and that requires not less than two years' experience in stores where prescriptions of medical practitioners have been compounded before said diploma is issued.

**§4. Assistants in pharmacy, qualifications of.**

Assistants in pharmacy must be twenty-one years old and have had two years' experience in stores where prescriptions of medical practitioners have been prepared, and shall have passed a satisfactory examination before the board of pharmacy of Texas.

**§5. Board of pharmaceutical examiners.**

As soon as convenient after the passage of this act the presiding judge of the district court of the several districts shall, as soon as practicable, severally appoint a board of pharmaceutical examiners for their respective districts, who shall hold their office two years, which appointment shall be in writing and signed by the judge

making the same and delivered to the person appointed. Said board of pharmaceutical examiners shall be composed of not less than three qualified pharmacists, who are residents of the districts of which they are appointed. If a vacancy occurs in said board another shall be appointed as aforesaid to fill the unexpired term. Said board shall have power to make by-laws and all the necessary regulations for the proper fulfillment of their duties under this act.

**§6. Meetings of board of examiners, duties of.**

The board shall meet within ninety days after the passage of this act, and once a year thereafter, in as central portions of the district as practicable, and shall give one month's notice through the public press of the time and place of such meeting. The board shall organize for business by electing a registrar of pharmacy. The duties of said board shall be to examine all applicants for registration; to direct the registration by the registrar of all persons properly qualified or entitled thereto.

**§7. Registrar of pharmacy, duties of.**

The duties of the registrar of pharmacy shall be to keep a book in which shall be entered, under the supervision of the board of pharmacy, the name and place of business of every person who shall apply for registration, and a statement, signed by the person making the application, of such facts in the case as may claim to justify his or her application. It shall also be the duty of the registrar to duly note the fact against the name of any qualified pharmacist who may have died or removed from the state or disposed of or relinquished his business.

**§8. Examination of applicants; certificate of registration.**

Any person in order to become a qualified pharmacist within the meaning of this act, shall apply and appear for examination and registration, and shall pay to the board of pharmacy five dollars; and on passing the examination required, shall be furnished free of cost a certificate of registration signed by the said board. Should said person fail to pass a satisfactory examination, he may, at any other one meeting of the board of pharmacy within twelve months, be permitted to be examined without cost.

**§9. Graduates shall be registered.**

Graduates, as specified in section three, shall apply for registration, and if they produce satisfactory evidence to the board of pharmacy that they have a right to be registered, shall, upon paying the said board three dollars, be furnished a certificate of registration without examination.

**§10. Persons exempt from examination shall register.**

Proprietors who are actively engaged in the preparation of physicians' prescriptions and compounding and vending medicine in the

State of Texas, at the passage of this act, shall be exempt from examination; also assistants who are likewise engaged and have been so engaged for three years, and are twenty-one years old; *provided*, he, she, or they will register, as specified in this act, at first meeting of the board of pharmacy, and upon paying the board three dollars shall be furnished with a certificate of registration; *provided*, that the provisions of this bill shall not prevent any person from engaging in the business herein described as proprietors or owners thereof; *provided*, such proprietor or owner shall have employed in his business some qualified pharmacist to fill prescriptions and compound drugs.

**§11. Certificate of registration shall be posted in place of business.**

All persons receiving a certificate of registration shall place it in a conspicuous place in their place of business. In failing to do this, the board of pharmacy shall cancel their registration and deprive them of their certificate.

**§12. Person illegally acting as pharmacist may be fined.**

Any person not a qualified pharmacist, but continues to compound prescriptions or retail medicines without complying with this act, shall, upon the first conviction, be sentenced to pay a fine of not less than fifty nor more than one hundred dollars; and upon the second and every subsequent conviction shall be sentenced to a fine of not less than one hundred nor more than two hundred dollars.

**§13. Person fraudulently procuring registration guilty of a misdemeanor.**

Any person who shall procure or attempt to procure registration for himself or for another, under this act, by making or causing to be made any false representation, shall be deemed guilty of a misdemeanor, and shall be fined not less than twenty-five nor more than one hundred dollars, and the name of the person so fraudulently registered shall be stricken from the register.

**§14. Temporary certificate issued, when and how.**

Any member of the board of pharmacy may issue temporary certificates upon satisfactory proof that the applicant is competent; but said temporary certificate shall be null and void after the first regular or extra meeting of the board next after granting said temporary certificate; *provided, further*, that not more than one temporary certificate shall ever be granted to any one person.

**§15. Act given in charge to grand jury.**

All courts having jurisdiction in criminal causes are required to give this act in charge to each grand jury impanelled in such courts.

**§16. Act does not apply to certain cities and towns.**

This act shall not apply to towns and cities containing less than one thousand inhabitants. Towns and cities that arrive at one or more thousand inhabitants on and after the passage of this act shall come within its provisions. The manner of ascertaining the census shall be the last official one, whether it be federal, state, town, or city.

**§17. Physicians and proprietors not within the act, when.**

Nothing in this act shall be construed to apply to any practitioner of medicine who does not keep open shop for compounding, dispensing, and selling medicines, nor so construed as to prevent any person or persons from investing their means in a drug store or stores; *provided*, they keep employed qualified pharmacists for the direct supervision of vending and compounding medicines. [Act April 6; July 6, 1889; 21 Leg. p. 125.]

## TITLE 75.—PRINCIPAL AND SURETY.

## ART.

3660. Surety may require suit to be brought. *Annotated.*

3661, 3662. See Civil Statutes.

3663. Execution levied first on property of principal. *Annotated.*

## ART.

3664. Rights of surety who makes payment on judgment. *Annotated.*

3665 to 3667. See Civil Statutes.

3668. Who is surety within this title. *Annotated.*

## ART. 3660. Surety may require suit to be brought.

(1.) The intention of the indorsers being to make themselves severally as well as jointly bound with the principal, the death of one indorser did not relieve his estate from liability. *Latham v. Flour Mills*, 68 T. 127.

Since the adoption of the Revised Statutes, the common law must be looked to in ascertaining the liability of the personal representation of a deceased joint obligor; at common law he is discharged, and if he be a surety, his estate cannot be liable for the debt. If, however, the surety participates in the consideration for which the joint obligation was made, his estate is liable. If the consideration for which the joint obligation was given was the discharge of a prior obligation, on which the surety was liable, such discharge would be sufficient to render the estate of the surety liable. *Boyd v. Bell*, 69 T. 735.

(7.) The payment of usurious interest is a valid consideration for an extension of time made upon such payment, upon a promissory note.

Our courts have frequently held that a valid agreement changing the terms of an obligation, as by extending the time of payment, without the consent of the sureties, will operate as a discharge of their liability. *Mann v. Brown*, 71 T. 241.

(10.) As a general proposition, whenever a principal on a note is discharged, his sureties will be also; but to this rule there are certain well established exceptions. For instance, the note of a married woman is generally held to be void; but if persons, not themselves under disability, sign the note of a married woman, without the payee having been guilty of fraud or deceit in procuring the signature of such married woman, the sureties would be liable though the principal be discharged. [2 *Daniel on Neg. Inst.*, par. 1306a; *Davis v. Staaps*, 43 Ind. 103; *Allen v. Berryhill*, 27 Iowa, 531; *Hicks v. Randolph*, 3 Baxter, 352.]

The same principle has been extended to sureties on notes executed by infants; and it is believed that no valid reason can be given why sureties of a person of unsound mind should not be held liable under like circumstances, though the principal be discharged, especially so when the payee of the note is ignorant of the fact that the principal is a lunatic; as in such case a recovery might be had even against the lunatic, if the payee acted in good faith. [*Pomeroy's Equity*, vol. 2, p. 946.] *Lee v. Yandell*, 69 T. 34.

(11.) The owner of several promissory notes, executed by four persons, who signed each of them as principals, and which were secured by lien on land, afterwards agreed with one of the debtors that, in consideration of one hundred dollars then paid, and in further consideration that if another note, then made by the debtor, for one hundred and fifteen dollars, bearing interest and payable before the lien notes matured, was paid, to release the one debtor from liability on the lien notes, and if the one hundred and fifteen dollars more was paid, to release one hundred acres of the land from the lien. The note for one hundred and fifteen dollars was not paid when it matured, and an extension of time was refused.

*Held:*

1. The payment made of one hundred dollars, and the making of the note for one hundred and fifteen dollars, which matured before the lien notes became due, constituted a sufficient consideration to support the promise for the release of the lien.

2. Since the contract did not stipulate for the withdrawal of the promise to release the lien on non-payment of the note for one hundred and fifteen dollars, the right to withdraw the promise did not exist.

3. The contract for interest after the maturity of the note indicated that time was not of the essence of the contract.

4. When it is intended to make time of the essence of a contract, apt and explicit words declaring that intention must be used.

5. The owner of the several notes, who thus stipulated for the release of one debtor, and who afterwards purchased the one hundred acres of land at foreclosure sale to satisfy his lien notes, acquired no advantage by his purchase.

6. The liability of the other principals in the note continued after the release of the one who thus contracted for his discharge. *Kirchoff v. Voss*, 67 T. 320.

ART. 3663. Execution levied first on property of principal.

(3.) It is error to render judgment against a principal and in favor of a surety with direction that execution shall issue, in a suit against both, when the surety has not paid the debt, and when his right to an execution is not made dependent on his future payment. *Labbe v. Corbett*, 69 T. 503.

ART. 3664. Rights of surety who makes payment on a judgment.

(15.) One of several co-sureties who voluntarily pays a note, the principal debtor being insolvent, is entitled in a suit to enforce contribution against his co-sureties to recover from each his aliquot proportion of the original debt, according to the number of the original sureties who are solvent; he also must sustain his proportion of the loss resulting from insolvency. *Acers v. Curtis*, 68 T. 423.

(16.) A surety on a promissory note may buy his discharge and leave in full force the original debt against his principal. *McIlhenny Company v. Blum*, 68 T. 197.

(17.) As between joint promisors, who are principals, a release of one is a release of all; but as between promisors who sustain as between themselves the relation of principal and surety, the liability of the principal is made neither more nor less by the release of a surety, and the latter may stipulate for his own discharge, and leave the creditor to pursue his remedy against the principal for the full amount of the original debt. *McIlhenny Co. v. Blum*, 68 T. 197.

ART. 3668. Who is surety within this title.

(1.) The fact that security is required for the performance of an obligation is a sufficient notice to the surety that the obligee is unwilling to trust solely to the skill, diligence or honesty of the principal obligor, hence, in order that the surety may avoid the bond, he must not only show that he was not informed of facts known to the obligee, affecting the fitness of the principal obligor for the duty to be performed, but that there was a fraudulent concealment or withholding of facts material for the surety to know. Whether the failure of the obligee to disclose facts known to him should be deemed fraudulent, depends much upon the character of the facts concealed, if the facts show unfitness to perform the duty required or guilt on the part of the principal obligor of gross moral delinquency, it would seem that these facts should be revealed to the surety, whether asked for or not.

When security is required for the discharge of a trust requiring strict integrity, and the obligee knows that the person from whom he requires bond with security for its performance is dishonest, it is his duty to inform the surety.

The fact that the treasurer of the association from whom bond with security is required, may, as such treasurer, during a former term, have mingled the funds of the association with his own, and thus used the identical trust fund for individual purposes, and in this way may have been guilty of a technical conversion, and this with the knowledge of the association, who failed through its proper officers to inform the sureties of the fact, will not relieve such sureties from liability on the treasurer's bond for a subsequent defalcation. *Screwmen v. Smith*, 70 T. 168.

## TITLE 76.—PUBLIC BUILDINGS AND GROUNDS.

## ART.

3669 to 3675b. See Civil Statutes.

3675bb. Lease of temporary capitol building. *New.*

## ART.

3675c, 3676. See Civil Statutes.

**ART. 3675bb. Lease of temporary capitol building authorized.**

The superintendent of public buildings and grounds be authorized to lease for the term of ten years, at the rate of five dollars per annum, the temporary capitol building, situated in the city of Austin, to the board of directors of the John B. Hood Camp of ex-Confederate Veterans; *provided*, that said board of directors shall make a good and sufficient bond to the governor and his successors in office for the keeping of said building in good repair; *and provided further*, that said board of directors keep said building insured with a reliable insurance company. [Act March 30, 1889; 21 Leg. p. 138.]

## TITLE 77.—PUBLIC DEBT.

ART.  
3677 to 3678c. See Civil Statutes.  
3678d. §1. Manuscript bonds issued.  
*New.*  
§2. Proceeds of sale applied to  
purchase of matured bonds.  
*New.*

ART.  
3678d. §3. Bonds sold, when; outstand-  
ing bonds called in, etc.  
*New.*

**Art. 3678d, §1. Manuscript bonds issued.**

The governor of the state is hereby authorized to have prepared manuscript bonds of the state to the amount of four hundred and ninety-nine thousand dollars, payable thirty years from date, to bear interest at the rate of five per centum per annum, said bonds to be redeemable at the option of the state at any time after five years from the date of their issuance, signed by the governor and state treasurer and countersigned by the comptroller.

**§2. Proceeds of sale applied to purchase of matured bonds.**

The bonds authorized by this act shall be sold by the governor at not less than their face value, and the proceeds arising from the sale thereof shall be applied to the purchase of the bonds issued by authority of the act of August 5th, 1870, and payable at the option of the state in 1890; *provided*, that this act shall not apply to the bonds of the act of August 5th, 1870, that are held by the special funds of the state.

**§3. Bonds sold, when; outstanding bonds called in.**

The governor shall at a reasonable time before the bonds to be redeemed under this act become payable, sell to the board of education, as an investment for the special funds, such an amount of the bonds authorized by section 2 of this act as will be sufficient to redeem such bonds of the act of August 5th, 1870, as are not held by the special funds; and when the sale shall have been made, the comptroller shall notify, by publication, the holders of the bonds to be redeemed that the same have been called for redemption, and interest on the same shall cease from the date of the call. The bonds redeemed under this act shall be destroyed by the comptroller in the presence of the governor, and a certificate of the destruction of said bonds shall be signed by the governor and comptroller, giving the numbers and amount of bonds destroyed, which certificates shall be filed in the office of the comptroller. [Act April 5; July 6, 1889; 21 Leg. p. 82.]



## TITLE 78.—PUBLIC EDUCATION.

## CH. 1.—UNIVERSITY OF TEXAS.

## ART.

3679, 3680. See Civil Statutes.

3680a. Securities made non-negotiable.

*New.*3680b. Deficiency bonds transferred to university fund. *New.*

## ART.

3681 to 3681b. See Civil Statutes.

3681c. Donations to University of Texas made, how. *New.*3681d. Donations to University of Texas made, how. *New.***ART. 3680a. Securities made non-negotiable.**

The treasurer of the State of Texas shall in the presence of the board of education have indelibly written, stamped, or cut upon the face of all negotiable bonds now or that may hereafter be held by the state in trust for any of its public institutions the words: "This bond is non-negotiable and belongs to the...fund (naming the fund) of the State of Texas," and he shall sign or stamp his official name thereto. Said treasurer shall also in the presence of said board have indelibly written, stamped, or cut upon each coupon or any such bond the words "non-negotiable." Any such bond or coupon thus indorsed shall be non-negotiable. [Act February 1, 1889; 21 Leg. p. 121.]

**ART. 3680b, §1. Deficiency bonds transferred to university fund.**

The governor is hereby authorized and directed to have issued manuscript bonds of the State of Texas, to be sold, or exchanged at par, for the permanent university fund at any time when there is on hand in cash any reasonable amount of such funds not less than five thousand dollars.

§2. DENOMINATION, RATE OF INTEREST AND REDEMPTION. That said bonds shall be of such denomination as the governor may direct, and shall be redeemable at the pleasure of the state, and shall bear interest at the rate of five per centum per annum, payable annually at the state treasury on the first day of March of each year.

§3. FORM OF; TRANSFER TO UNIVERSITY FUND. That bonds issued under this act, the title of which and the date of its passage shall be recited therein, shall be signed by the governor and treasurer and countersigned by the comptroller, and shall be registered in the office of the state treasurer; and after said bonds have been registered, the governor shall offer said bonds to the board of education as an investment for the permanent university fund then on hand in cash which are by law authorized to be invested; and if the board of education take said bonds, the treasurer and comptroller shall make the proper entry, showing the facts of the transaction and the necessary transfer of such fund on their books; and if the board of education shall not take said bonds thus offered, the

same shall be destroyed and canceled and of no effect whatever. [Act April 2, 1889; 21 Leg. p. 81.]

**ART. 3681c, §1. Donation to University of Texas made, how.**

*Whereas*, the University of Texas is not a corporation capable of receiving a title to property donated, being an institution of learning under the control of the state government; therefore,

*Be it enacted, etc.*, That any person, association of persons, or body corporate making a donation of property for the purpose of establishing or of assisting in the establishment of a professorship or scholarship in the university or any of its branches, either temporarily or permanently, may vest the legal title of the property in any person or persons, body corporate or the State of Texas, to be held in trust for said purpose under such directions, limitations, and provisions as may be declared in writing in the donation which are not inconsistent with the objects and proper management of said institution or its branches.

**§2. Declaration of trusts made, how.**

It shall be lawful for the person or persons or body corporate to declare and direct the manner in which said title to said property shall thereafter pass or be transmitted from the person or persons or body corporate receiving it to others in continued succession, to be held and appropriated to the use aforesaid, and it shall be lawful for the donor or donors to declare and direct the persons or class of persons who shall receive the benefit of said donations, together with the manner in which the person or persons who shall receive said benefits shall be from time to time selected, as it may become necessary to carry out the object of the donation; *provided*, said declarations and directions are not inconsistent with the objects and proper management of said institution or its branches.

**§3. Title shall vest in the state, when.**

In the event there is a failure to transmit the title to the property, or to bestow its use in the manner as declared and directed in the donation, or in the event they or either of them should become impracticable from the change of circumstances, the title to the property, unless otherwise directed expressly by the donor, shall vest in the State of Texas, to be held in trust to carry into effect the purposes of the donation as nearly as may be practicable by such agencies as may be provided therefor.

**§4. Donation subject to laws for the protection of the same.**

The title to said property donated shall be received, and the trust conferred in the donation shall be assumed, subject to laws that may be passed and carried into effect from time to time which may be necessary to prevent a loss of or damage to the property donated or an abuse or neglect of the trust so as to defeat, materially change, or prevent the objects of the donation.

**§5. University board shall file copy of donation, and report, etc.**

Copies of said donation shall be procured and filed with the board which may have control of the university or any of its branches to which the donation applies, which board shall report the condition and management of the property and the manner in which the trust is being administered as part of the matters reported pertaining to said institution. [Act March 21, 1889; 21 Leg. p. 143.]

See, *post*, Art. 3681d.

**ART. 3681d, §1. Donation to University of Texas made, how.**

*Whereas*, the University of Texas is not a corporation capable of receiving a title to property donated, being an institution of learning under the control of the state government; therefore,

*Be it enacted, etc.*, That any person, association of persons, or body corporate making a donation of property for the purposes of establishing or of assisting in the establishment of a professorship or scholarship in the university or any of its branches, either temporarily or permanently, may vest the legal title in the property in any person or persons, body corporate or the State of Texas, to be held in trust for said purpose under such directions, limitations, and provisions as may be declared in writing in the donation which are not inconsistent with the objects and proper management of said institution or its branches.

**§2. Declaration of trust made, how.**

It shall be lawful for the person or persons or body corporate to declare and direct the manner in which said title to said property shall thereafter pass or be transmitted, from the person or persons or body corporate receiving it, to others in continued succession to be held and appropriated to the use aforesaid, and it shall be lawful for the donor or donors to declare and direct the person or class of persons who shall receive the benefit of said donation, together with the manner in which the person or persons who shall receive said benefits shall be from time to time selected, as it may become necessary to carry out the object of the donation; *provided*, said declarations and directions are not inconsistent with the objects and proper management of said institution or its branches.

**§3. Title shall vest in the state, when.**

In the event there is a failure to transmit the title to the property or to bestow its use in the manner as declared and directed in the donation, or in the event they or either of them should become impracticable from the change of circumstances, the title to the property, unless otherwise directed expressly by the donor, shall vest in the State of Texas to be held in trust to carry into effect

the purposes of the donation as nearly as may be practicable by such agencies as may be provided therefor.

**§4. Donation subject to laws for the protection of the same.**

The title to said property donated shall be received, and the trust conferred in the donation shall be assumed, subject to laws that may be passed and carried into effect from time to time which may be necessary to prevent the loss of or damage to the property donated, or an abuse or neglect of the trust so as to defeat, materially change, or prevent the objects of the donation.

**§5. University board shall file copy of donation, and report, etc.**

That copies of said donation shall be procured and filed with the board which may have control of the university or any of its branches to which the donation applies, which board shall report the condition and management of the property and the manner in which the trust is being administered as part of the matters reported pertaining to said institution. [Act March 27, 1889; 21 Leg. p. 144.]

NOTE.—This and the foregoing act, Art. 3681c, contain the same provisions. The first act originated in the House; the second act originated in the Senate.

## CH. 2.—AGRICULTURAL AND MECHANICAL COLLEGE.

ART.  
3682 to 3702a. See Civil Statutes.

ART.  
3702b. Agricultural experiment stations; assent to establishment of. *Amendment.*

**ART. 3702b. Agricultural experiment stations; assent to establishment of.**

*Whereas*, the Congress of the United States, by an act approved March 2d, A. D. 1887, and entitled: "An act to establish agricultural experiment stations in connection with the colleges established in the several states, under the provisions of an act approved July 2d, 1862, and of the acts supplementary thereto," has granted to each of the states and territories of the United States an appropriation of fifteen thousand dollars for the purpose indicated in the title of said act and fully set forth in the body thereof; *and, whereas*, said act in section 9 thereof provides that the grants of money therein authorized are made subject to the legislative assent of the several states and territories to the purpose of said grants; therefore,

**§1. *Be it enacted, etc.***, That the State of Texas does hereby assent to the purposes of said grant, and designates the Agricultural and Mechanical College of Texas as such station. [Amendment April 3; July 6, 1889; 21 Leg. p. 54.]

## CH. 2a.—NORMAL SCHOOLS.

ARTS. 3702c, 3702d. See Civil Statutes.

## CH. 3.—PUBLIC FREE SCHOOLS.

### ART.

3703. See Civil Statutes.  
3703, §6. School lands of counties. *Annotated.*  
3704. See Civil Statutes.  
3704a. Loan to available school fund. *New.*  
3704b. Sinking fund created and loaned to available school fund. *New.*  
3705 to 3718. See Civil Statutes.  
3719. State superintendent shall require reports, etc. *Amendment.*  
3720 to 3727. See Civil Statutes.  
3728. Available school fund paid out, how. *Amendment.*

### ART.

3729 to 3736. See Civil Statutes.  
3736a. Office of county superintendent may be abolished. *New.*  
3737 to 3740. See Civil Statutes.  
3740a. Treasurers of counties and cities required to report disbursements. *New.*  
3741 to 3763. See Civil Statutes.  
3764. Counties exempted from the district system. District system in, adopted, how. *Amendment.*  
3765 to 3775. See Civil Statutes.  
3776. Teachers' vouchers, how paid. *Annotated.*  
3777 to 3780d. See Civil Statutes.

### ART. 3703, §6. School lands of counties.

(1.) Section 6, article 7, of the state Constitution, on the subject of county school lands vesting title thereto in the counties, and providing that "actual settlers residing on said lands shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres at the price fixed" by the county court, not including the value of their improvements, extended to all county school lands, but did not operate as a grant to such settlers; and to defend against a vendee of the county, such settlers are compelled to buy at the price fixed by the commissioners' court of the county which owned the land. *Land Co. v. Wood*, 71 T. 460.

The settler upon county school land is secured in the right to purchase the land occupied by him not to exceed one hundred and sixty acres. His occupancy operates as notice of his claim against purchasers from the county. To defend against such claim the settler must complete his purchase by complying with the terms of sale fixed by the commissioners' court of the county owning the land. *Land Co. v. Earle*, 71 T. 468.

### ART. 3704a, §1. Loan from general revenue fund to available school fund.

The comptroller is hereby authorized to transfer the sum of two hundred and fifty-four thousand dollars from the general revenue fund to the available public free school fund, to be used in liquidation of the outstanding warrants held by the several counties against said available public free school fund for the scholastic year ending August 31st, 1888.

### §2. Loan to available school fund returned, when.

Should the amount herein set apart exceed the sum necessary to liquidate the said outstanding warrants, the comptroller shall, after paying such warrants, transfer such excess back to the general revenue fund. The sum used by the comptroller in paying said warrants shall be considered a loan to the available public free school fund, and shall be returned to the general revenue fund:

without interest when the available free school fund shall justify it, not later than January 1st, 1895. [Act May 11, 1888; 20 Leg. S. S. p. 7.]

**ART. 3704b, §1. Sinking fund created and loaned to available school fund.**

The sum of two hundred and fifty thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, set aside out of the surplus revenue now in the state treasury, as a sinking fund, for the purpose of paying off such portion of the bonded indebtedness of the State of Texas maturing in 1890 and 1891 as is held by individuals, and that said sinking fund so created be loaned to the available school fund for the purpose of supplying any deficiency that may exist in said fund without interest until the maturity of said bonds in 1890 and 1891.

**§2. Amount due sinking fund paid, when.**

The comptroller of public accounts is hereby authorized to place to the credit of the available school fund the amount hereby set aside as a sinking fund, and it shall be his duty to see that provision is made for its return through the proper channels prior to the maturity of the state bonds for the payment of which said sinking fund is created. It shall be the duty of the board of education to set apart, out of the available school fund for the years 1890 and 1891, before the appointment for said years shall be made, an amount sufficient to pay off said bonds as they fall due. And the comptroller is directed to use said money in payment of said bonds as herein provided. [Act May 9, 1888; 20 Leg. S. S. p. 7.]

**ART. 3719. State superintendent shall require reports, etc.**

The state superintendent shall require of county judges, county, city, and town superintendents, county and city treasurers, and treasurers of school boards, and other school officers and teachers, such school reports relating to the school fund and other school affairs as he may deem proper for collecting information and advancing the interests of the public schools, and shall furnish to county, city, and town superintendents, and other school officers and teachers, for the use of such officers and teachers, the necessary blanks and forms for making such reports and carrying out such instructions as may be required of them; and any county judge, or county, city, or town superintendent, assessor, treasurer, or teacher, who shall fail to make such report within twenty days after the same shall have been required by the state superintendent to be filed, shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined in any sum not less than twenty-five dollars or more than five hundred dollars, the same to be paid, when collected, to the available school fund. [Amendment April 8; July 6, 1889; 21 Leg. p. 15.]

**ART. 3728. Available school fund paid out, how.**

The state treasurer shall receive and hold as a special deposit all moneys belonging to the available school fund and keep an account of the several sources from which they accrue. He shall open and keep an account with every county, city, or town in the state to which the board of education issues a certificate (showing them to be entitled to receive any portion of the available free school fund), wherein he shall credit each such county, city, or town with the amount apportioned to them by such certificate, and duplicates of all such certificates shall be furnished the state treasurer at the time [of] the issuance thereof by the board of education. On the first day of each month after this bill becomes a law and goes into effect the state treasurer shall set apart to each county, city, or town such a portion of the available free school fund as has come into his hands during the preceding month, as is shown by the certificates held by them to be due to each upon a pro rata distribution thereof. Said money so set apart shall not be used by the state treasurer for any purpose other than to pay the warrant drawn by the state comptroller upon presentation of such certificates. Whenever the treasurer of any such county, city, or town shall present such warrant to the state treasurer for payment, he shall pay to him such an amount as has been set apart under the provisions of this act to such county, city, or town, and no more, and shall pay from time to time, when demanded, such sums of money as have been so set apart to the treasurer of such county, city, or town, taking his receipt therefor. The state treasurer shall also charge the various counties, cities, and towns in their respective accounts with the amount or amounts so paid, and shall also at the time of payment indorse upon the back of such warrant the amount paid, the date when paid, and sign the same officially. When the whole amount of such warrant has been paid, it shall be by such county, city, or town treasurer presenting it, receipted in full and delivered to the state treasurer. [Amendment April 4; July 6, 1889; 21 Leg. p. 16.]

**ART. 3736a. Office of county superintendent may be abolished.**

The county commissioners' court of any county in this state shall have the power and authority, when in their judgment such court may deem it advisable, to abolish the office of county superintendent of public instruction in their county, by an order entered on the minutes of their court at a regular term thereof. Whenever such office is abolished the county judge of such county shall, from the date of said order, perform the duties of such office; and the county superintendent shall immediately turn over to such county judge all the books, papers, records, and other school property in his possession. [§486 added; April 6, 1889; 21 Leg. p. 58.]

**ART. 3740a. Treasurers of counties and cities to report disbursements.**

It shall be the duty of the county treasurer of each county, and the city treasurer, or treasurer of the school board of each city or town having exclusive control of its schools, to report the disbursement of the school fund, state and county, to the commissioners' court of his county. Said report shall be made at the first regular term of the commissioners' court after the thirty-first of August of each year or the end of the school year, and shall consist of a complete exhibit of all moneys received and paid out by him, to whom paid, upon what voucher, and what moneys if any remain in his hands.

**§2. Report of treasurer, etc., transmitted to state superintendent.**

When such report shall have been examined and approved by the commissioners' court it shall be the duty of the county treasurer to immediately transmit a copy of such report, including a statement of the status of the permanent county school fund, certified to by the county clerk, to the superintendent of public instruction at Austin.

**§3. Failure to report, a misdemeanor.**

Any county or city treasurer failing to make and transmit said report and certified copy, or either, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars nor more than five hundred dollars. [Act May 15; August 14, 1888; 20 Leg. S. S. p. 6.]

**ART. 3764. Counties exempt from the district system.**

The following counties shall be, and the same are, exempted from the district system provided for in this act, to-wit: Angelina, Aransas, Bastrop, Bosque, Bowie, Brazoria, Burleson, Calhoun, Callahan, Cameron, Camp, Cass, Chambers, Concho, Delta, Dewitt, Duval, Encinal, Erath, Falls, Fannin, Fayette, Fort Bend, Franklin, Freestone, Goliad, Gregg, Grimes, Gaudalupe, Hardin, Hays, Henderson, Hidalgo, Hopkins, Jackson, Jasper, Jefferson, Karnes, Lampasas, Liberty, Limestone, Lee, Marion, Matagorda, McMullen, Menard, Milam, Montgomery, Morris, Nacogdoches, Newton, Orange, Panola, Pecos, Polk, Presidio, Rains, Reeves, Red River, Refugio, Robertson, Rusk, Sabine, San Augustine, San Jacinto, Shackelford, Shelby, Smith, Somervell, Starr, Trinity, Tyler, Upshaw [Upshur], Van Zandt, Victoria, Waller, Washington, Webb, Wharton, Zapata, and Houston.

**DISTRICT SYSTEM MAY BE ADOPTED BY A SUBDIVISION OF A COUNTY.** *Provided*, the citizens in any community or section of territory embraced in any of said above named counties may adopt the district system by designating a portion of the territory of any of said counties not exceeding four miles square, and conforming to the provisions and requirements of sections 30, 31, 32, 33, and



34, of chapter 25, of an act, entitled: An act to establish and maintain a system of public free schools for the State of Texas, and to repeal so much of chapter 3, of title 78, of Revised Statutes of Texas, as refers to public free schools outside of incorporated cities and towns assuming or having assumed control of their public free schools, and all laws or parts of laws in conflict with this act of the special session of the Eighteenth Legislature, which passed the senate January 30th, 1884, and passed the house of representatives February 4th, 1884, and was presented to the governor February 6th, 1884, and became a law without his signature, and by conforming to the general provisions of said act and to the acts amendatory thereof, it being intended by this act to permit subdivisions of counties mentioned in this act not exceeding six miles square to avail themselves of and to adopt the district system when the whole county does not want to adopt it. [Amendment April 3; July 6, 1889; 21 Leg. p. 59.]

**ART. 3764. Counties exempted from the district system.**

(1.) The following counties shall be, and the same are, exempted from the district system provided for in this act, to-wit: Anderson, Angelina, Aransas, Bastrop, Bosque, Bowie, Brazoria, Burleson, Calhoun, Callahan, Cameron, Camp, Cass, Chambers, Concho, Delta, DeWitt, Duval, El Paso, Erath, Falls, Fannin, Fayette, Fort Bend, Franklin, Freestone, Gillespie, Goliad, Gonzales, Gregg, Grimes, Guadalupe, Hardin, Hays, Henderson, Hidalgo, Hopkins, Jackson, Jasper, Jefferson, Karnes, LaSalle, Lee, Lampasas, Liberty, Limestone, Medina, Marlon, Mason, Matagorda, McMullen, Milam, Montgomery, Morris, Nacogdoches, Newton, Orange, Panola, Pecos, Polk, Presidio, Rains, Reeves, Red River, Refugio, Robertson, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Smith, Somervell, Starr, Titus, Tom Green, Trinity, Tyler, Upshur, Van Zandt, Victoria, Waller, Washington, Webb, Wheeler, Wharton, and Zapata. [Amendment May 14, 1888; 20 S. S. p. 5.]

**ART. 3776. Teachers' vouchers, how paid.**

(2.) The fact that a county treasurer, in settlement with one of the sureties on his general bond, has misappropriated school funds and paid them to him, can furnish no defense in a suit against the county to enforce payment of school claims audited, allowed and required to be paid by the act of 1883, even though such surety were one of the several plaintiffs in the suit. *Caldwell County v. Harbert*, 68 T. 321.

## CH. 4.—PUBLIC SCHOOLS IN INCORPORATED CITIES AND TOWNS.

**ART.**

3781 to 3782*g*. See Civil Statutes.

3783. Powers of town council and board of aldermen. *Annotated*.

3783*a* to 3793. See Civil Statutes.

3793*a*. §1. Title and control of school property in cities, etc., vested, how. *New*.

**ART.**

3793*a*. §2. Treasurer shall execute bond. *New*.

§3. School fund payable to treasurer. *New*.

§4. Special school tax levied and assessed, how. *New*.

§5. Act applies to cities having special charters. *New*.

**ART. 3783. Powers of town council and board of aldermen.**

(1.) Construing this article in the light of the public policy evinced by constitutional and statutory provisions referred to in the opinion, the conclusion announced that it was not intended by it to give to such towns as should assume

control of their public schools the right not only to buy building sites and erect school-houses, but also to create a bonded indebtedness in furtherance of that object.

If such towns should be regarded as possessing the power to create a bonded indebtedness in order to buy land and build educational structures thereon, no limitation could be found in the statutes upon the amount of debt they might contract for such a purpose. This would contravene the policy of the state, as shown in legislation regarding cities organized under general laws, whose power to impose taxes is carefully restricted.

The power to borrow money or to create a debt without limit, is not a necessary incident of the power conferred on a town corporation to buy grounds and build school-houses, and cannot be implied, when its exercise by larger municipal corporations is only authorized under express limitations by organic and statute law.

The special charter granted the town of Waxahachie on the twenty-eighth of April, 1871, conferred no greater power regarding the creation of debt to purchase ground and build school-houses than did the general law on towns incorporated under it.

[*Hitchcock v. Galveston*, 96 U. S. 341, and *Galveston v. Loonie*, 54 T. 517, reviewed and distinguished from this case.]

The proviso in article 420 of the Revised Statutes, limiting the amount of the bonded debt of cities, includes every character of bonded indebtedness. *Waxahachie v. Brown et al.*, 67 T. 519.

**ART. 3793a, §1. Title and control of school property in cities, etc., vested, how.**

In all cities and towns in this state which have assumed or may hereafter assume the exclusive control and management of the public free schools within their limits, and which have determined or may hereafter determine that such exclusive control and management of the public free schools within their limits shall be in a board of trustees, and organized under an act of the Sixteenth Legislature, approved April 3d, 1879, and acts amendatory thereto, the title to all houses, lands, and other property owned, held, set apart, or in any way dedicated to the use and benefit of the public free schools of such city or town, including property heretofore acquired as well as that which may hereafter be acquired, shall be vested in the board of trustees and their successors in office in trust for the use and benefit of the public free schools in such city or town, and such board of trustees shall have and exercise the exclusive control and management of such school property, and shall have and exercise the exclusive possession thereof for the purposes aforesaid; *provided*, that where trustees are named, other than the municipal corporation itself, in any instrument conveying, donating, bequeathing, or devising any money or other property, real or personal, for the benefit of any city or town, this act shall not interfere in any manner with the title or authority of such trustees to or over such money or other property. And such board of trustees shall constitute a body corporate, and shall have full power to protect the title, possession, and use of all such property within the limits of such city or town, and may bring and maintain such suit or suits in law or in equity in any court of competent jurisdiction, when necessary, to recover the title or possession of any such property that

may be adversely held or seized, or to prevent any trespass upon or injury to such property, and the power and authority of any such board of trustees to bring and maintain any suit in relation to the recovery of such property or of the possession and use thereof, or for any trespass thereon or injury thereto that may now be pending in any court of this state, is hereby authorized, ratified, and confirmed; *provided*, that the provisions of this section (1) shall not apply to lands belonging to the state upon which houses for school purposes have been built without authority from the state.

**§2. Treasurer shall execute bond.**

The treasurer of the board of trustees of any such city or town, before entering upon the duties of his office, shall execute a bond with two or more good and sufficient sureties, payable to the State of Texas, and to be approved by such board of trustees, and in such sum as shall be fixed by said board of trustees, not less than one-half of the annual school revenues that shall come into his hands, conditioned that such treasurer will receive and disburse such school funds as shall come into his hands according to law, and that he will render a full and true account of all such funds.

**§3. School fund payable to treasurer.**

The pro rata of the available school fund of the state appropriated and set apart to such city or town shall be, by the proper officer or department of the state, paid over directly to such treasurer of the board of trustees, who shall execute the proper receipts therefor; and all moneys and funds arising from the assessment and collection of any special tax in such city or town for public free school purposes shall be by the assessor and collector, or the collector or other proper officer of such city or town whose duty it is to collect the taxes, turned over directly to the treasurer of the board of trustees of such city or town, who shall execute and deliver his receipt to such collector, and the mayor and council or board of aldermen of such city or town shall have no power or control over such funds.

**§4. Special school tax levied and assessed, how.**

In such cities and towns as have assumed the exclusive control of the public free schools within their limits, and have decided under the laws providing therefor that a special tax shall be levied for the support of such public free schools, the mayor and council or board of aldermen of such city or town shall annually assess and levy such tax by ordinance duly passed and approved in the same manner as is required in the assessment and levy of taxes for general purposes in such city or town. In cities and towns which have voted upon and directed the levy of a special tax not exceeding one-half of one per cent., the mayor and council or board of aldermen of such city or town shall annually levy such rate of taxes for

public school purposes, not exceeding one-half of one per cent., as shall be sufficient for the support of the public free schools for the term as required by law, but in such cities and towns as have voted upon and decided at an election held for that purpose that a specific rate of taxes shall be assessed and levied in such city or town for the support of its public free schools, the mayor and council or board of aldermen of such city or town shall have no discretion in fixing the rate at which such tax shall be levied, but shall assess and levy the same at the rate fixed in the proposition as submitted and adopted by the qualified voters of such city or town at the election held for that purpose.

**§5. Act applies to cities having special charters.**

The provisions of this act shall apply to cities organized under special charters or special acts of incorporation, but not to cities and towns organized and incorporated under the general law. [Act March 27; July 6, 1889; 21 Leg. 128.]

## TITLE 79.—THE PUBLIC LANDS.

## CH. 1.—PUBLIC DOMAIN.

## ART.

3794, 3794a. See Civil Statutes.

3794a. §1. Board of arbitration to determine boundaries of Greer county, created. *New.*§2. Appointment of arbitrators made, how. *New.*§3. Powers and duties of the board. *New.*

## ART.

3794a. §4. Decisions rendered, when; effect of. *New.*§5. Appropriation, how expended. *New.*§6. Act shall take effect, when. *New.*

3795 to 3800a. See Civil Statutes.

As to mines and mineral lands, see, *ante*, title 64b.**ART. 3794b. Board of arbitration to determine boundaries of Greer county, created.**

*Whereas*, a controversy exists between the United States and the State of Texas over the title of that territory lying between the North Fork, or Red river proper, and the South Fork, formerly known as Prairie Dog Town river, east of the one hundredth degree of longitude, the same being designated on the maps of Texas as Greer county; and, *whereas*, all efforts heretofore made by and between the United States and the State of Texas for a settlement of said controversy have failed; and, *whereas*, it is desirable that said conflicting claims should be finally settled and determined; therefore,

§1. *Be it enacted, etc.*, That a board of arbitration be, and the same is hereby, created for the purpose of deciding said controversy and finally determining the ownership of said territory.

**§2. Appointment of arbitrators made, how.**

Said board of arbitration shall consist of three persons, who shall be learned in the law, one of whom shall be appointed by the president of the United States, one by the governor of Texas, and the third, who shall be the chief justice of some one of the states other than Texas, shall be agreed upon and appointed by the president of the United States and the governor of Texas.

**§3. Powers and duties of the board.**

Said board of arbitration shall meet at such place or places as may be designated by a majority of its members, and shall have full authority to send for persons and papers, to administer oaths, and to hear and receive testimony in behalf of the respective claims of the United States and the State of Texas, including any evidence heretofore taken and received by the joint boundary commission under the act of Congress approved January 31st, 1885, and to thoroughly investigate and decide said controversy to the end that it may be definitely settled and determined whether said territory belongs to the United States or the State of Texas.

**§4. Decision rendered, when; effect of.**

Said board of arbitration shall be appointed and enter upon the work hereby assigned them as early as practicable after the passage of an act of similar import to this by the Congress of the United States, and shall render their decision as soon as the importance of the issue and a proper investigation thereof will justify; and when said decision is rendered the same shall be by said board of arbitration certified to the president of the United States and the governor of Texas, and shall be recorded in the respective general land offices of the United States and the State of Texas, and said decision shall be final and decisive of said controversy.

**§5. Appropriation, how expended.**

That the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, to be expended under the direction of the governor of this state, to defray the expenses and for compensation of those members of said board of arbitration appointed by the governor, and agreed on by the governor and president; *provided*, that the United States shall pay a sum equal to that paid by the state as compensation for that member of said board jointly appointed by the president and governor of Texas.

**§6. Act shall take effect, when.**

This act shall take effect and be in force as soon as the Congress of the United States shall pass an act in accordance herewith. [Act Feb. 23, 1889; 21 Leg. p. 93.]

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**CH. 2.—GENERAL LAND OFFICE.**

**ARTS. 3801 to 3817.** See Civil Statutes.

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**CH. 3.—LAND DISTRICTS.**
**ART.**

**3818 to 3833m.** See Civil Statutes.

**3833n.** Buchel and Foley counties attached to Brewster. *New.*

**3833o.** §1. Ector, Upton and Crane counties attached to Midland. *New.*

**ART.**

**3833o.** §2. Glasscock county attached to Howard. *New.*

§3. Conflicting laws repealed. *New.*

**ART. 3833n.** Buchel and Foley counties attached to Brewster county for surveying purposes.

The counties of Buchel and Foley be, and they are hereby, attached to the county of Brewster for surveying purposes. All laws, and parts of laws, in conflict herewith are hereby repealed. [Act March 22, 1889; 21 Leg. p. 83.]

**ART. 3833o, §1. Counties of Ector, Upton, and Crane attached to Midland.**

The unorganized counties of Ector, Upton, and Crane are hereby attached to the organized county of Midland for judicial, surveying, and other purposes.

**§2. Glasscock county attached to Howard.**

The unorganized county of Glasscock is hereby attached to the organized county of Howard for judicial, surveying, and other purposes.

**§3. Conflicting laws repealed.**

All laws or parts of laws in conflict with this act be, and the same are hereby, repealed. [Act March 21, 1889; 21 Leg. p. 92.]

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**CH. 4.—COUNTY AND DISTRICT SURVEYORS.**

**ART.**  
3834 to 3836. See Civil Statutes.  
3837. Duties of county surveyor. *An-*  
*notated.*

**ART.**  
3838 to 3870. See Civil Statutes.

**ART. 3837. Duties of county surveyor.**

(1.) Certified copies of the records of offices of district and county surveyor, are admissible to show by what certificate a given survey was made. *Stout v. Taul*, 71 T. 438.

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**CH. 5.—LAND CERTIFICATES.**

**ART.**  
3871 to 3893a. See Civil Statutes.  
3893b. §1. Relocations by certificates  
filed in general land office  
validated. *New.*

**ART.**  
3893b. §2. Locations made out of dis-  
trict validated. *New.*  
§3. Vested rights not affected.  
*New.*

**ART. 3893b, §1. Relocations by certificates filed in general land office validated.**

In all cases where parties resurveyed or relocated lands by virtue of any valid land certificates previously surveyed and on file in the general land office, without having taken out certified copies thereof, and thereby failed to comply strictly with the law, such last named survey, which in law might be deemed a relocation, shall be valid and the owner shall hold thereunder, thereby abandoning all other surveys previously made, and the commissioner of the general land office is authorized to issue patents therefor. [Act April 16, 1889, §1; 21 Leg. p. 107.]

**§2. Locations made out of district validated.**

All surveys heretofore made by any county or district surveyor, which would otherwise be valid, shall not be called in question on

account of said surveys having been made outside of the proper county or district, but said surveys shall be valid the same as if the said surveyor had jurisdiction in the territory embracing the same.

### §3. Vested rights not affected.

The provisions of this act shall not apply to nor affect the rights of third persons heretofore acquired by virtue of any purchase from the state location or surveys made in accordance with the laws in force at the time of such location and survey.

## CH. 6.—ENTRIES AND LOCATIONS.

### ART.

3894 to 3897. See Civil Statutes.

3898. Certificate not to be lifted after entry. *Annotated.*

### ART.

3899. Effect of a location on a valid title. *Annotated.*

3900 to 3905. See Civil Statutes.

### ART. 3898. Certificate not to be lifted after entry.

(1.) A survey made on the location of a land certificate cannot be corrected by making a survey on entirely different land.

When a block of surveys embracing many locations under certificates belonging to the same owner is in partial conflict with land previously appropriated, the right to float and relocate all the certificates can find no sanction in law. Only so much of each location as may be in entire or partial conflict with older surveys can be floated.

Neither the recognition of the commissioner of the general land office of illegal surveys as valid corrected surveys, nor his permission to file them, can impart validity to them.

Although the owner of a land certificate was mistaken in his initial point of survey, yet if he surveyed vacant land which he intended at the time to thus appropriate, such survey deprives him of the right afterwards to float his certificate and locate it on other land. *Adams v. Railway*, 70 T. 252.

(2.) The statutes which declare that land certificates, when once located on unappropriated public domain shall not be floated, fix irrevocably the location of the certificate when once properly made, and forbids the acquisition of title from the state to any other part of the public domain.

A statute which in terms only professes to validate surveys, cannot be applied to validate illegal surveys, when it can be applied to surveys legal in every respect when made, but not returned in time prescribed by law.

When a valid land certificate has been located on unappropriated public domain, and the land is properly surveyed, and the certificate returned to and filed in the general land office as required by law, the right to appropriate other land by the same certificate no longer exists. The owner of such certificate has then no power to abandon his claim to the land thus located and surveyed, and thereby restore the certificate to its original force.

If locations and surveys were made in 1872 which covered lands not vacant at the time they were made, the owner of the certificate was entitled to a duplicate certificate, which might be located on unappropriated land.

If such owner was led into error by incorrect maps in the general land office as to the true position of the land thus held by prior right, his failure to take out a duplicate certificate should not prejudice his right to other land surveyed under the circumstances existing in this case, even though such certificate was in the general land office when the second survey was made. A mere irregularity in applying the certificates under such circumstances cannot deprive such survey of the character of land "equitably owned under color of title from the sovereignty of the soil." *Adams v. Railway*, 70 T. 252.



**ART. 3899. Effect of a location on a valid title.**

(1.) Section 2, of article 14, of the state Constitution provides, among other things, that "all genuine land certificates heretofore or hereafter issued shall be located, surveyed or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation which is on the county records, or in the general land office, or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him." *Held:*

1. The words, "land titled," as used in the section, embrace land covered by that evidence or right which the state gives through a patent, and are not restricted to those lands which are held under patent which, in the absence of section 2, article 14, would be deemed sufficient to confer title.

2. If for reasons not appearing on the face of a patent, the grant would be void, or voidable, yet, in contemplation of section 2, article 14, the land embraced in the calls of the patent would, for the purposes contemplated by the section, be deemed "land titled."

3. [Truehart v. Babcock, 51 T. 117; Summers v. Davis, 49 T. 554; Westrop v. Chambers, 51 T. 188; Bryan v. Crump, 55 T. 10; Stubblefield v. Boggs, 2 Ohio St. 219; Day Land and Cattle Company v. The State, 68 T. 525; DeCourt v. Sproul, 66 T. 368; Hanrick v. Dodd, 62 T. 91; Woods v. Durrett, 28 T. 436; Sherwood v. Fleming, 25 T. Sup. 427; and Patrick v. Nance, 26 T. 301, cited.]

4. Under section 2, article 14, of the Constitution, any location made on land which, before the adoption of that Constitution, had been patented, is illegal, though the patent may have been void if it emanated from offices of the state authorized to convey title.

5. [Hanrick v. Dodd, 62 T. 91, and Miller v. Brownson, 50 T. 533, reviewed.]

6. When an illegal location is made on "land titled," the subsequent cancellation of the patent will not validate the location. Winson v. O'Connor, 69 T. 571.

**CH. 7.—SURVEYS AND FIELD-NOTES THEREOF.****ART.**

3906 to 3920. See Civil Statutes.

3921. All surveys properly returned validated. *Annotated.*

**ART.**

3922, 3923. See Civil Statutes.

**ART. 3921. All surveys properly returned validated.**

(1.) This article, in so far as it embraces only that found in the second section of the act of April 25th, 1871, must be construed as a continuation thereof, and not as new enactment of the same. Each statute related to the same character of surveys, and such surveys as were protected and validated by the act of April 25th, 1871, if on file in the general land office when that act was passed, are protected and validated by this article if on file when the Revised Statutes were adopted. Adams v. Railway, 70 T. 252.

**CH. 8.—PRE-EMPTIONS.**

**ARTS. 3924 to 3936.** See Civil Statutes.

**ART. 3924a. Chapter 8 repealed.**

All of chapter 8, in title 79, consisting of articles numbers 3924, 3925, 3926, 3927, 3928, 3929, 3930, 3931, 3932, 3933, 3934, 3935 and 3936 be, and the same is hereby, repealed. [Act March 7, 1889; 21 Leg. p. 16.]

## CH. 9.—HOMESTEAD DONATIONS.

**ART.****3937.** Who is entitled to one hundred and sixty acres. *Annotated.***3938, 3939.** See Civil Statutes.**3940.** Shall be sworn to, filed and recorded. *Annotated.***3941.** See Civil Statutes.**ART.****3942.** Preference right to survey and patent. *Annotated.***3943 to 3946.** See Civil Statutes.**3947.** No assignment valid, unless by deed, etc. *Annotated.***3948 to 3951.** See Civil Statutes.**ART. 3937. Who is entitled to 160 acres.**

(1.) To obtain one hundred and sixty acres of land as a pre-emption, it must be settled upon and occupied by a family. When the family has for its head a husband and wife, the right to the land results from their joint settlement and labor, and is community property.

The fact that settlement upon public land was made by a woman and her husband, after the wife had, from her own means, and before marriage, paid the surveyor's fees, will not deprive the property of its community character, when the husband and wife resided on the land in compliance with law until the title issued. *Mills v. Brown*, 69 T. 244.

(2.) A contract for the joint acquisition of title to vacant land is neither within our statute of frauds nor against public policy. Such contract can be enforced by partition of such lands.

Such rights can attach to the land when acquired subject to any burden, legal or equitable, upon it at the time of its occupancy as homestead. A contract to acquire land to be used as homestead does not require the assent of the wife, and it will be enforced without her aid or consent, even after its occupancy as the homestead. *Reed v. Howard*, 71 T. 204.

**ART. 3940. Shall be sworn to, filed and recorded.**

(3.) The law does not contemplate that a survey shall be made of a pre-emption, or an application therefor filed, until the pre-emptors have actually settled on the land. The payment of the surveying fees and the survey must enure to the benefit of the family. The issuance of patent to the heirs of one spouse cannot defeat the community rights of the other. *Mills v. Brown*, 69 T. 244.

**ART. 3942. Preference right to survey and patent.**

(1.) Whatever rights result to one who, in the terms of the law, made application for a homestead donation of public domain, are lost by a failure to occupy it. *Garrett v. Weaver*, 70 T. 463.

(2.) As the head of the family the husband has the right to select the domicile; but as a pre-emptor he has no vested right in vacant land settled upon by him, until he has lived on it the length of time required by law to obtain a patent, and he may sell or make agreements concerning it without being joined by his wife. Until he is entitled to a patent there is no vested homestead right in land so occupied by him, and he may agree to the appropriation of it between himself and another. *Mitchell v. Nix*, 1 U. C. 126.

**ART. 3947. No assignment valid, unless by deed, etc.**

(1.) Two settlers on vacant land agreed, before a survey was made, on a dividing line, on the faith of which both improved their respective selections. One of them verbally sold his improvements, the other at the time representing to the purchaser that he did not claim any of the land sold. The one who did not sell agreed with the purchaser that all the vacant land should be surveyed in his name, he to convey to the purchaser all the land included in the survey, situated on the purchaser's side of the agreed line, when patented, the purchaser to pay his share of the expenses; under which agreement the purchaser continued to improve the land occupied by him and offered to pay his part of the expenses. One to whom the land was afterwards patented, and who had notice of the agreements concerning it, cannot recover from the first purchaser the land on which he has his improvements, and which he was to have by the agreements concerning the division line, survey and patent. *Mitchell v. Nix*, 1 U. C. 126.

## CH. 10.—PATENTS.

## ART.

3952 to 3958. See Civil Statutes.

3959. Shall issue patent to assignee, when. *Annotated.*

3960 to 3962. See Civil Statutes.

3962a, §4. Suit for patent fees, etc., brought, when and how. *Annotated.*

## ART.

3963, 3964. See Civil Statutes.

3964a. Patents and surveys issued under special laws confirmed. *Annotated.*

3964b to 3967a. See Civil Statutes.

## ART. 3959. Shall issue patent to assignee, when.

(1.) A contract in writing which purports to convey an interest in land after its location and before patent issues, cannot affect a subsequent innocent purchaser from the vendor, or his creditors, unless it is authenticated for record and recorded. The sale of the land certificate after its location effects an equitable transfer of the land located by virtue of it, but a mere filing of a conveyance which evidences the sale in the general land office does not give that constructive notice to creditors and subsequent purchasers which results from registration in the proper county. *Lewis v. Johnson*, 68 T. 448.

## ART. 3962a, §4. Suit for patent fees, etc., brought, etc.

(1.) A payment is generally held involuntary and recoverable by the payer when made to an officer who has power immediately to enforce the collection; but where such immediate authority does not exist the payment is not deemed compulsory. Nor does protest against it change its character if not in fact compulsory.

The statute, section 2, act of March 25th, 1879, provides a penalty for the failure to pay patent fees when the patents are ready for delivery. Upon suit to recover such penalty if the fees claimed are illegal no penalty could be enforced, and the commissioner of the land office having no power to enforce directly the payment of patent fees, the payment of patent fees claimed to be illegal would not be a payment under duress or compulsion.

The commissioner of land office is required to forthwith pay fees collected to the treasurer, and a mere protest does not relieve him from the duty. Nor will it cast upon the commissioner the responsibility of deciding at his peril a difficult legal question.

Following section 16, act of April 18th, 1879, the contract for building the new capitol stipulated that the state agrees, covenants and binds itself to convey to the party of the second part (the contractor) the complete and perfect title to three million acres of land \* \* \* and it is expressly agreed \* \* \* that the titles to said lands shall be made to the party of the second part by the commissioner of the land office on the certificate of the capitol building commissioners, to be countersigned and approved by the comptroller as the work progresses, and in installments as hereinafter set out." Construing this contract with the laws existing at the time of its execution *patents* were contemplated as the form in which the titles of said lands should be issued.

The fees of the land office are in the nature of an assessment made upon those who avail themselves of the services of its officers and employes and are provided for the purpose of making the land office self-sustaining, as required by the state Constitution, article 19, section 1.

Under a general law fees are charged upon all patents issued from the land office, and there is no exception contained in the capitol contract or law under which it was made.

Patent fees were properly collected of appellant upon patents issued to him under the contract by which he owned the lands. *Taylor v. Hall*, 71 T. 213.

## ART. 3964a. Patents and surveys issued under special laws confirmed.

(1.) When the proviso to an act of the Legislature restricts its benefits to designated persons, the fact that a claimant of such bounty belongs to the designated class must be shown before he can recover. *Blum v. Looney* 63 T. 1.

## CH. 11.—LAND RESERVATIONS.

<b>ART.</b> <b>3968.</b> Mississippi & Pacific Railway re- serve opened, when. <i>Annotated.</i>	<b>ART.</b> 3968a to 3976. See Civil Statutes.
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### **ART. 3968. M. & P. Ry. reservation, when opened, etc.**

(3.) The sufficiency of the description given in the map and designation of the land reservation of the Memphis, El Paso & Pacific Railway Company, filed in the general land office on the twentieth of June 1857, and in the office of the district surveyor of Bexar land district on the seventeenth of February, 1857, has been repeatedly recognized by both the legislative and executive departments of the state. It was not necessary to fix the locality of the reservation that a survey should be made, and description given of such reservation. The description (which is contained in the opinion) identifies sufficiently the boundaries of the reservation.

The charter of the Memphis, El Paso & Pacific Railway Company, granted by act of the Legislature of Texas, February 4th, 1854, by which the land was granted and the reserve created, and upon which the company acted and invested its capital, is a contract within the protection of that clause of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. That contract was not affected by the provisions of section 5, article 10, of the Constitution of 1868. *H. & T. C. Railway v. T. & P. Railway*, 70 T. 649.

## CH. 11a.—SALE OF VACANT AND UNAPPROPRIATED LAND.

<b>ART.</b> <b>3976a, §6.</b> Vacant and unappropriated lands set apart for sale, etc. <i>Annotated.</i>	<b>ART.</b> 3976b. See Civil Statutes. <b>3976c, §1.</b> Sale of appropriated lands in organized counties. <i>Amend-</i> <i>ment.</i>
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### **ART. 3976a, §6. Area of tracts sold.**

(1.) The act of July 14th, 1879 (Civil Statutes, Vol. 1, p. 352), authorized the sale of such separate tracts of land in unorganized counties as, at the time of its passage, contained not more than six hundred and forty acres, the fact that a tract of land of greater area when that act was passed than six hundred and forty acres may subsequently have been lawfully appropriated to private ownership to such an extent as to leave less than six hundred and forty acres unappropriated, would not render such residue subject to sale. *Garrett v. Weaver*, 70 T. 463.

### **ART. 3976c, §1. Sale of appropriated lands in organized counties.**

Any person desiring to purchase any of such appropriated public lands situated in organized counties of the State of Texas as contain not more than six hundred and forty acres, appropriated by an act to provide for the investment of the proceeds of such sale, approved July 14th, A. D. 1879, may do so by causing the tract or tracts which such person may desire to purchase to be surveyed by the authorized public surveyor of the county in which such land is situated. The provisions of this act shall not be so construed as to prohibit the right of acquiring any of said lands under chapter 9, title 79, Revised Civil Statutes, within the bounds of the reservation here made; but any person shall have the same right of acquiring a homestead within this reservation, under the homestead

T. 79, CH. 12; T. 80.] THE PUBLIC LANDS, ETC. Arts. 3977-4021.

donation laws of this state, as he may have had prior to the passage of this act; *provided*, where it is ascertained that any of such lands as contain not more than six hundred and forty acres is situated within the inclosed lands of any actual *bona fide* settler and resident of the state, such settler shall have the preference right for six months from the time that the same shall have been declared by the commissioner of the general land office to be vacant and subject to sale, to purchase as much of said land as may be embraced within his inclosure; *provided*, that said preference right shall not be given to any person who has inclosed any vacant land, knowing the same to be vacant at the time of inclosing same. [Amendment April 5; July 6, 1889; 21 Leg. p. 48.]

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## CH. 12.—GENERAL PROVISIONS.

ARTS. 3977 to 3989a. See Civil Statutes.

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## TITLE 80.—PUBLIC PRINTING.

ARTS. 3990 to 4021. See Civil Statutes.

## TITLE 81.—PUBLIC SCHOOL, ASYLUM AND UNIVERSITY LANDS.

### CH. 1.—THE UNIVERSITY AND ASYLUM LANDS.

**ART.**

4022 to 4030a. See Civil Statutes.

4030b, §1. Lands surveyed under alternate certificates withdrawn from public domain. *New.*

§2. Excess in alternate surveys set apart to free school fund. *New.*

**ART.**

4030b, §3. Correction of surveys confirmed; excess set apart to free school fund. *New.*

§4. Purchasers in good faith protected. *New.*

§5. Patented lands not within the act. *New.*

4030c. Numbers of conflicting surveys may be changed. *New.*

#### **ART. 4030b, §1. Lands surveyed under alternate certificates withdrawn from public domain.**

All surveys and blocks of surveys heretofore made by virtue of valid alternate scrip be, and the same are hereby, declared to segregate from the mass of the public domain all the land embraced in said surveys, or blocks of surveys, as evidenced by the corners and lines of same, or by calls for natural or artificial objects, or the calls for the corners and boundaries of other surveys, or by the maps and other records in the general land office.

#### **§2. Excess in alternate surveys set apart to free school fund.**

That all excess in said surveys or blocks of surveys are hereby donated and declared to belong to the public free school fund of the state; and it shall be the duty of the commissioner of the general land office to ascertain, by any and all means practicable, the existence and extent of such excesses, and to provide for and direct such surveys, or corrected surveys, as may be necessary for this purpose; *provided*, that where such surveys were made in blocks of two or more surveys, said respective surveys shall remain on the ground consecutively as placed therein, as shown by the maps, sketches, and field-notes originally returned to the general land office; *provided*, that the person who has already purchased, or who may hereafter purchase from the state, the particular section to which surplus shall by such resurvey be made contiguous, shall have the prior right for the period of six months after such resurvey shall have been made, in which to purchase such excess on the same terms on which such purchaser has already bought or may buy.

#### **§3. Correction of surveys confirmed; excess set apart to free school fund.**

That all such surveys which under the direction of the commissioner of the general land office have been or may be hereafter corrected, so that all excess in the original surveys shall be placed in

the surveys belonging to the public free schools, are hereby validated, and the action of the commissioner is hereby ratified; and he is directed and authorized to issue patents to the owners thereof, and to sell such surveys belonging to the public free schools, securing to the state the benefit of such excesses.

**§4. Purchasers in good faith protected.**

The provisions of this act shall not apply to nor affect the rights of the third persons heretofore acquired in good faith.

**§5. Patented lands not within the act.**

*Provided*, that nothing in this act shall apply to any lands for which patents have been issued. [Act March 22, 1889; 21 Leg. p. 103.]

**ART. 4030c. Numbers of conflicting surveys may be changed.**

*Whereas*, there are conflicting locations made by virtue of alternate land certificates; and, *whereas*, the common school or even numbered surveys in the conflicting location are not identical; and, *whereas*, uncertainty exists as to what particular surveys belong to the common school fund; therefore,

§1. *Be it enacted, etc.*, That where the common school or even numbered surveys in conflicting locations, made by virtue of alternate land certificates, are not identical or upon the same land, the commissioner of the general land office may, where he deems it to interest of the state to do so, change the numbers of the surveys in the conflicting locations so as to make the common school or even numbered surveys in both locations identical; *provided*, that the commissioner of the general land office shall not change the numbers of surveys without the written consent of the owner of the certificates by virtue of which said surveys are made. [Act April 8, 1889; 21 Leg. p. 104.]

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**CH. 2.—THE PUBLIC FREE SCHOOL AND COUNTY SCHOOL LANDS.**

ART.  
4031 to 4037b. See Civil Statutes.  
4037c. Lands within the limits of Greer county appropriated. *Annotated.*

ART.  
4037d. See Civil Statutes.

**ART. 4037c. Lands within the limits of Greer county appropriated.**

(1.) The act of March 15th, 1881 [2 Civil Statutes, p. 321], authorized the issuance of veteran certificates, provided that they might be located as headright certificates upon any of the public domain and patented as in other cases. *Held*, that the territory embraced within the limits of Greer county having been appropriated by the act of February 25th, 1879 [Civil Statutes, Art. 4037c], was not public domain within the meaning of the act of March 15th, 1881, and was not subject to location by such certificates. The words *public domain* as used in the

latter act must be construed to mean unappropriated public domain. *Day Company v. The State*, 68 T. 526.

All the lands within the boundaries of Greer county, which were unappropriated at the date of the passage of the act of February 25th, 1879 [Civil Statutes, Art. 4037c], were by that act appropriated to specific purposes, and until by actual surveys they are subdivided, and the several tracts are set apart to the specific objects contemplated by that act, the state may maintain a suit for their recovery, and for the cancellation of patents thereto, which have been illegally issued.

The power to determine concerning the disposition of the public domain, except as limited by the Constitution, pertains exclusively to the legislative department of the state. The governor and commissioner of the general land office cannot disregard the legislative will, legally expressed, or in defiance of it, issue patents for lands which the Legislature has withdrawn from individual appropriation. The power to issue land patents is an executive duty, defined and circumscribed by law; when the law is violated by the action of the governor and commissioner in this regard, the judicial department may inquire into it, and by decree annul the patents illegally issued.

[*The State v. Delesdenier*, 7 T. 75, and *Sherwood v. Fleming*, 25 T. Sup. reviewed.] *Day Company v. The State*, 68 T. 526.

### CH. 3.—PROVIDING FOR THE SALE AND LEASE OF SCHOOL AND OTHER PUBLIC LANDS.

**ART.**  
4038 to 4041. See Civil Statutes.  
4042. Sale of classified lands regulated. *Amendment.*  
4043, 4044. See Civil Statutes.  
4045. Privileges and restrictions relating to actual settlers in purchasing lands. *Amendment.*  
4046, 4047. See Civil Statutes.  
4048. Forfeitures for non-payment, etc. *Amendment.*  
4049. See Civil Statutes.  
4050. Timber lands; price and regulations by commissioner as to sale of. *Amendment.*  
4051. Commissioner to lease lands; terms, etc., of lease. *Amendment.*  
4051a, §1. Lands of unorganized counties may be leased. *New.*  
§2. Counties authorized to control when organized. *New.*  
4052. Application to lease, how made. Terms and conditions. *Amendment.*

**ART.**  
4053, 4054. See Civil Statutes.  
4955. Prescribing penalties for unlawfully appropriating, etc., said lands. *Annotated.*  
4056 to 4058. See Civil Statutes.  
4059. Agricultural lands may be withheld from lease; detached sections may be sold. *Amendment.*  
4060 to 4069. See Civil Statutes.  
4070. Venue of suits. *Annotated.*  
4071 to 4080. See Civil Statutes.  
4080a, §1. Time for payment for school lands extended. *New.*  
§2. Time for payment of interest not extended. *New.*  
4080b, §1. Sales by land board validated. *New.*  
§2. Certain persons excluded from benefits of act. *New.*  
§3. Titles of vendees validated, when. *New.*  
§4. Patents heretofore issued validated. *New.*

#### ART. 4042. Sale of classified lands regulated.

When any portion of said land has been classified to the satisfaction of the commissioner under the provisions of this act or former laws, such land shall be subject to sale, but to actual settlers only, and in quantities of not less than eighty acres and in multiples thereof, nor more than one section containing six hundred and forty acres, more or less; *provided*, that when there is a frac-



tion less than eighty acres of any section left, such fraction may be sold; but lands classified as purely pasture lands and without permanent water thereon may be sold in quantities not to exceed four sections to the same settler; and in no event shall sale be made to a corporation, either foreign or domestic, and all sales to a settler shall be upon the express condition that any sale or transfer of such land to any corporation, directly or indirectly, before patent is issued thereon, shall *ipso facto* terminate the title of the purchaser or owner, and such land shall be forfeited to the state without re-entry and become again a part of the particular fund to which it formerly belonged. [Amendment §5, April 8; July 6, 1889; 21 Leg. p. 50.]

**ART. 4045. Privileges and restrictions relating to actual settlers in purchasing lands.**

Any *bona fide* actual settler who may reside on any part of the lands the sale of which is authorized by this act at the time this act may go into effect, shall have the right for a period of six months after the same shall have been appraised to purchase such quantity of land as may be limited by this act, to include his improvements, upon complying with the provisions of this act regulating sales as in other cases, and such land shall be appraised without reference to improvements thereon. That any *bona fide* settler who has heretofore purchased or who may hereafter purchase one section of agricultural or watered land, and no more, shall have the right to purchase three dry and strictly pastoral sections upon his making oath that he is not acting in collusion with others for the purpose of buying for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase of the same. [Amendment, §8, April 8; July 6, 1889; 21 Leg. p. 50.]

**ART. 4048. Forfeitures for non-payment, etc.**

If upon the first day of August of any year the interest due on any obligation remains unpaid, the purchaser shall have until the first day of the following January in which to pay said interest, and for said default said purchaser shall pay fifty per cent. penalty on said interest then past due; and if said purchaser shall fail to pay said past due interest and penalty on or before said first day of January, the commissioner of the general land office shall indorse on such obligation "land forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall be forfeited to the state without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged and be resold under the provisions of this act or any future law; *provided*, if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of August next

after such death. And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred; or if he shall fail to make the proof of occupancy within the time and in the manner prescribed by the regulations of the commissioner of the general land office, as provided for in section 9 of this act, he shall in like manner forfeit the land and all payments thereon to the state; *provided further*, that nothing in this section contained shall be construed to inhibit the state from instituting such legal proceedings as may be necessary to enforce such forfeiture or to protect any other right to such land, which suits may be instituted by the attorney-general, under the directions of the governor, in the proper court of the county in which the land lies or in the district court of Travis county, and jurisdiction of such cases is hereby expressly conferred on said courts; *provided*, this section shall be printed on the back of receipt. [Amendment §11, April 8; July 6, 1889; 21 Leg. p. 50.]

**ART. 4050. Timber lands; price and regulations by commissioner as to sale of.**

The commissioner of the general land office shall adopt such regulations for the sale of the timber on timbered lands as may be deemed necessary and judicious, such regulations to be subject to the approval of the governor. Such timber shall not be sold for less than five dollars per acre cash, except in such cases as the commissioner may ascertain by definite examination of a state agent that any particular section is sparsely timbered or contains timber of but little value, in which case he shall be authorized to sell the timber on said section at the best price, on the best terms practicable; *provided*, such timber is sold at not less than two dollars per acre. And in no case shall less than one section of timbered land be sold to any purchaser, except in cases of fractional sections which may be sold under the provisions of this act. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so such timber shall be forfeited to the state without judicial ascertainment; *provided*, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold for not less [than] two dollars per acre, as other lands are sold under the provisions of this act. [Amendment §13, April 8; July 6, 1889; 21 Leg. p. 50.]

**ART. 4051. Commissioner to lease land; terms, etc., of lease.**

The public lands, and all lands belonging to the public free schools, asylums, or university fund, shall be leased by the com-

missioner of the general land office in accordance with the provisions of this act. All of such lands lying north of the Texas & Pacific Railroad and east of the Pecos river shall be leased for a period not longer than six years, except as hereinafter provided; and all lands lying south of the Texas & Pacific Railroad, and all lands west of the Pecos river, and all university lands, and all lying in the counties of Andrews, Gaines, Terry, and Yoakum, shall be leased for a period not longer than ten years, and the lessee shall pay an annual rental of four cents per acre for all lands leased; *provided*, that the university lands may be leased at three cents per acre per annum, which rental shall be paid each year in advance, the first payment to be made at the time the lease is executed, and if at the termination of the lease such land is still subject to lease, the lessee or lessees thereof whose term of lease is expired, shall have the refusal of such land as he has been leasing on the terms and at the price that may be fixed therefor by the commissioner of the general land office. All leases shall be executed under the hand and seal of the commissioner of the general land office, and shall be delivered to the lessee or his duly authorized agent, and such lease shall not take effect until the first annual rent is paid and the lease duly filed for record in the county where the land lies or to which it may be attached for judicial purposes, and it shall not be necessary for the commissioner to acknowledge such lease before the same is placed on record. [Amendment §14, April 8; July 6, 1889; 21 Leg. p. 50.]

**ART. 4051a, §1. Lands of unorganized counties may be leased.**

The commissioner of the general land office is hereby authorized to lease for a term of not exceeding ten years, at a price not less than two cents per acre, the three hundred and twenty leagues of land set apart and surveyed in the year 1882 for the unorganized counties of the state, situated in the counties of Hockley, Cochran, Bailey, Lamb, Andrews, Martin, Dawson, and Grimes, under the same rules and upon the same terms as are prescribed by law for the lease of the university lands. The proceeds of such lease shall be paid into the state treasury and become a part of the available school fund of the state.

**§2. Counties authorized to control when organized.**

Whenever any county entitled to said lands shall be organized, the control of said lands belonging to such county shall vest in the commissioners' court of such county, and any lease money thereafter becoming due shall be payable to such county, but all leases executed before such organization of the county shall be binding for the full term thereof. [Act April 8; July 6, 1889; 21 Leg. p. 108.]

**ART. 4052. Applications to lease, how made; terms and conditions.**

Any person desiring to lease any portion of the public lands belonging to the several funds mentioned in this act, shall make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease; thereupon the commissioner, if satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, and that such lands can be leased without detriment to the public interest, shall notify the applicant in writing that his proposition to lease is accepted; and thereupon he shall execute and deliver to the lessee, in the name and by the authority of the state, a lease of said land for such term as may be agreed upon, and deliver the same to such lessee when satisfied that the lessee has paid to the treasurer of the state the rent for one year in advance. No lands classified as grazing land under this act shall be subject to sale during the existence of such lease, and the possession thereof by the lessee shall not be disturbed during the term of such lease so long as the rents are paid promptly in advance each year as required by this act. The land classified as agricultural land, which may be leased under this act shall be leased subject to sale as provided by this act; and whenever such leased land may be purchased, the lessee shall give immediate possession to such purchaser; *provided*, that the lessee shall have a pro rata credit upon his next year's rent or the money refunded to him by the treasurer, as he may elect; *provided further*, that no such sale shall be permitted where such lessee shall have previously placed improvements of the value of one hundred dollars upon such section of lands sought to be purchased. That no purchaser or other person than the lessee shall be permitted to turn loose within such leasehold more than one head of horses, mules, or cattle, for every ten acres of land purchased, owned, or controlled by him and uninclosed, or in lieu thereof four head of sheep or goats to every ten acres of land so purchased, owned, or controlled and uninclosed. Each violation of the provisions of this act, which restricts the number of stock that may be turned loose on lands leased from the state, shall be an offense, and the offender on conviction shall be punished by fine of not less than one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this section shall constitute a separate offense. [Amendment §15, April 8; July 6, 1889; 21 Leg. p. 50.]

**ART. 4055. Prescribing penalties for unlawfully appropriating, etc., said lands.**

(1.) A demurrer was sustained to a petition filed by the attorney-general to compel by mandatory injunction the removal of inclosures around many thousand acres of public free school lands, which, in connection with line riders, practically closed and appropriated the same, excluding the public from grazing thereon, interfering with the removal of stock from one portion of the state to another, obstructing travel and impeding the sale of the public lands, *held*:

1. Such an inclosure is both a purpresture and a public nuisance.

2. By impeding the sale of the public lands, the act charged was violative of the act of February 7th, 1884, and it was the duty of the proper officers of the state to remove the obstruction by legal proceedings.

3. The inclosure, in so far as it might obstruct the right of common and the removal of cattle to market, would be such an interference with individual rights in public property as to constitute a nuisance, subject to be abated at the suit of the state, to accomplish which injunction is an appropriate remedy.

4. The fact that, by virtue of the act of February 7th, 1884, the inclosure of public land is made a penal offense, does not impair the right of the state to remove such inclosure by mandatory injunction.

5. [The decision in *Attorney-General v. Woods*, 108 Massachusetts Reports, 436, approved.]

6. The state is not confined to the action of trespass to try title to enforce its right to remove the inclosure.

7. The defendant could be enjoined from constructing new fences of the character complained of, without being compelled to join as defendants other persons who might be interested in the performance of such unlawful act, though he could not be compelled by mandatory injunction to remove a fence owned in part by others who were not defendants.

A plea in abatement, predicated on the non-joinder of parties defendant, should set forth definitely the nature and extent of the interest of each person who is claimed to be a necessary party.

In proceeding by injunction to compel the removal of fences which inclose public free school land, the defendant can be compelled to remove such fences as he has constructed on his own land, or on public land, but he cannot be compelled to remove such portions of the fencing as are on the lands of others, though he may have been a party to their erection, unless the owners of the land are made parties to the suit. If the defendant be part owner of the fence, either as partner or co-tenant, and such tenant or partner is beyond the reach of the court's process, he may be compelled to remove the fence without joining such co-tenant or partner as co-defendant. *The State v. Goodnight*, 70 T. 682.

**ART. 4059. Agricultural lands may be withheld from lease; detached sections may be sold.**

The commissioner of the general land office, under the direction of the governor, may withhold from lease any agricultural lands necessary for purposes of settlement, and no agricultural land[s] shall be leased if in the judgment of the commissioner they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual settlers only, under the provisions of this act, and all sections or fraction of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos, and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at not less than two dollars per acre, upon such terms as the commissioner of the general land office may prescribe. [Amendment §22, April 8; July 6, 1889; 21 Leg. p. 50.]

**ART. 4070. Venue of Suits.**

(3.) In a suit brought by the state under the provisions of the act of 1883, known as "the Land Fraud Act," it was held that the joinder of all the defendants, and of all the purchasers of land in one suit was proper, if not necessary.

In such a suit to cancel purchases of land, all persons in whose names the purchases were made, when the charge is that many purchases were made for the benefit of one or more of the defendants, are necessary parties.

The decision in *The State v. Snyder*, 66 T. 687, to the effect that a tender of money received by the state from one alleged to have fraudulently purchased her

land, cannot be demanded as prerequisite to the right of the state to cancel the contract, in a suit brought for that purpose.

When the right of action is based upon the acts of 1879 and 1881, the suit cannot be properly maintained under the act of 1883. *The State v. Rhomberg*, 69 T. 212.

**ART. 4080a. Time of payment for school lands extended.**

*Whereas*, under an act of the legislature of this state providing for the sale of university lands, approved April 8th, 1874, and an act of the Legislature of this state providing for the sale of the common school lands, approved July 8th, 1879, many of said lands were sold on a credit of ten years, the principal bearing ten per cent. interest per annum; and

*Whereas*, many of the obligations given for said lands are now due or about to become due, and said purchase money is bringing to the state a higher rate of interest than can be otherwise obtained for the same, and

*Whereas*, it is to the interest of the school and university funds, to which such lands belong, that the time for the payment of the principal of the purchase money be extended; therefore,

§1. *Be it enacted, etc.*, That all purchasers of said lands under either of the above recited acts, or their assignees, shall have ten years from the date when their original obligations given for said land shall have fallen due within which to pay the principal of said obligations, and no forfeiture of said lands shall be declared on account of the non-payment of the principal of said obligations until the expiration of ten years from date of the maturity of the same as originally made; *provided*, this act shall not apply to any purchaser or assignee who shall fail or refuse to pay within twelve months from date of approval of this act all accrued interest due the state on his original obligation or contract.

**§2. Time for payment of interest not extended.**

Nothing in this act shall be construed to in any respect relieve said purchasers from the payment of interest on said land in the manner or on the terms prescribed in said original acts, nor to prevent a forfeiture of said lands for a failure to comply with the terms of said original obligations in the payment of interest. [Act March 5, 1889; 21 Leg. p. 105.]

**ART. 4080b. Sales by land board validated.**

*Whereas*, the land board of the State of Texas, duly appointed for that purpose, did make contracts under the act of April 12th, 1883, for the sale to certain divers persons of the free school, university, and asylum lands of this state; and

*Whereas*, many of such persons acting in good faith, believing that the said contracts were valid and binding, and secured to them the right to acquire valid titles to said lands by a compliance therewith, have paid to the state a part of the purchase price of the said

lands and interest on the amount of the said contract price for several years; and

*Whereas*, it has been found that the said contracts were made by the said land board in many instances without a strict compliance with the requirements of the said law, whereby the said contracts are rendered invalid and said purchasers have failed to acquire any right under the said purchases and contracts so made; and

*Whereas*, it is inequitable and unjust that the said parties so acting in good faith, who have complied with their said contracts should be deprived of their equities so attempted to be acquired and which the state in good faith intended to confer upon them, by reason of the failure of the said land board to comply with the technical requirements of said law, and thus lose the benefit of what they have paid on said contracts and be deprived of the said lands; therefore,

§1. *Be it enacted, etc.*, That all contracts made by the land board of the State of Texas for the sale of the free school, university, and asylum lands, under the act of April 12th, 1883, to any person who has in good faith made such purchase and in good faith has complied with the requirements of said act, the rules and regulations of the state land board, and the terms and conditions of his said contract, shall be, and are hereby, made valid and binding upon the state in the same manner as if the said land board had in all particulars complied with the requirements of the said law.

§2. **Certain persons excluded from benefit of act.**

This act shall not apply to any person or persons who have failed to make a *bona fide* settlement upon the said land in such case as by the terms of his contract or the requirements of said land board settlement was required, nor to any person or persons who entered into such contracts of purchase under the agreement or promise on their part that actual settlement should be made thereon, unless he or they have made such actual settlement in good faith as required.

§3. **Title of vendees, etc., validated, when.**

The title of all vendees or assignees who on the first day of January, 1889, were actual *bona fide* settlers upon any land purchased from the aforesaid land board, holding said land under deed or regular chain of title from the original purchasers, and who are still residing upon said land—in cases where the original purchaser failed to comply with the law and the requirements of said land board as to settlement and occupancy, but where the annual installments of interest have been paid—are hereby validated and confirmed; *provided*, the provisions of this section shall not refer to nor include more than one section of agricultural or three sections of grazing lands.

T. 82, 83.] PUBLIC WEIGHERS—QUARANTINE. Arts. 4081–4098*h*.

**§4. Patents heretofore issued validated.**

All patents heretofore issued for any lands sold by the state land board, under the act of April 12th, 1883, are hereby validated. [Act March 12; July 6, 1889; 21 Leg. p. 106.]

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**TITLE 82.—PUBLIC WEIGHERS.**

ARTS. 4081 to 4089*b*. See Civil Statutes.

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**TITLE 83.—QUARANTINE.—PUBLIC HEALTH.**

**CH. 1.—QUARANTINE.**

ARTS. 4090 to 4098*g*. See Civil Statutes.

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**CH. 2.—REGULATIONS TO PREVENT ADULTERATIONS  
OF FOOD.**

ART. 4098*h*. See Civil Statutes.



## TITLE 83a.—QUO WARRANTO.

## ART.

4098i, §1. Information filed, when. *Annotated.*

§§2, 3. See Civil Statutes.

## ART.

4098i, §4. Trial; proceedings on appeal. *Annotated.*

§§5 to 7. See Civil Statutes.

## ART. 4098i, §1. Information filed, when.

(1.) A proceeding by *quo warranto* may be filed by a district attorney *pro tem.* appointed during a term of court by the district judge on account of the non-attendance of the district attorney. The authority of such an appointee to represent the state, after he has been recognized as a *de facto* officer, cannot be questioned in a collateral proceeding.

In a proceeding by *quo warranto*, to recover an office to which the relator claims to have been elected, an allegation that he was a citizen of the county and entitled to the office is, on general demurrer, a sufficient averment of his qualification to hold the office.

In such a proceeding a statement in the information that the relator received a majority of the ballots of the qualified voters of the county is sufficient, without setting forth the facts which constituted their qualifications. A more definite allegation would, however, be required, if the relator should claim that ballots had not been counted, on the ground that the persons casting them lacked some of the qualifications named in the statute, when in fact they possessed them all, and that thereby the relator lost his election.

The object of every popular election for office is to ascertain the will of the people as to who shall serve them. The laws enacted to secure this object, in so far as they require the election to be by ballot, the day of the election, and the place within designated precincts where the election shall be held, are mandatory. Other provisions prescribing the conduct of and return of an election are directory, and mere irregularities in their observance, which have not prevented the electors from exercising freely and fairly their right of suffrage, and from having their votes properly estimated for the candidates of their choice, must be treated as informalities which do not vitiate the election; *provided*, such irregularities are not of a character which the law declares shall vitiate an election.

When irregularities occur in the conduct of the officers holding the election, it must be made to appear by those claiming benefit from the election, that such irregular conduct has not prevented an honest and fair election.

Election returns cannot be counted if the irregular way in which they have been transmitted has resulted in their being changed since they were made out by the officer; and ballots which have been tampered with by reason of a failure to secure and properly forward the ballot box cannot be counted. If, however, the irregularities committed by the officer have in no way changed the result of the election, or its fair and honest character, the returns or ballots, as the case may require, will be corrected as readily as though the directory provisions of the law had been rigidly observed. *Fowler v. The State*, 68 T. 30.

(3.) A proceeding in the name of the state, and in the nature of *quo warranto*, upon the relation of one entitled to the office of district clerk, may be maintained by him to oust an intruder who has obtained possession and assumes to exercise the functions of such office. *Williams v. The State*, 69 T. 368.

(6.) A town duly incorporated, for several years failed to elect officers, and an effort was made by the inhabitants to reorganize under the general law without a compliance with its provisions. Under this reorganization municipal officers were elected. It was held that the validity of such reorganization and the consequent authority of the elected officers could be determined by a *quo warranto*. *The State v. Dunson*, 71 T. 65.

## ART. 4098i, §4. Trial; proceedings on appeal.

(1.) If an appeal from a judgment rendered in a proceeding by *quo warranto* is not presented to the next term of the supreme court, no matter at which of three places for holding court that may be, the appeal, when presented to some other term, must be dismissed for want of jurisdiction. The provision of the act which declares that the remedy and mode of procedure in some cases shall be construed as cumulative, does not affect the question. *Fontaine v. The State*, 69 T. 510; *Livingston v. The State*, 70 T. 393.

## TITLE 84.—RAILROADS.

## CH. 1.—INCORPORATION OF RAILROAD COMPANIES.

## ART.

4099, 4100. See Civil Statutes.

4101. Articles of incorporation shall contain what. *Amendment.*

4102 to 4104. See Civil Statutes.

## ART.

4105. Corporations may proceed to act, when. *Annotated.*

4106, 4107. See Civil Statutes.

**ART. 4101. Articles of incorporation shall contain what.**

The persons proposing to form a railroad corporation shall adopt and sign articles of incorporation, which shall contain:

1. The name of the proposed corporation.
2. The places from and to which it is intended to construct the proposed railroad, and the intermediate counties through which it is proposed to construct the same; *provided, however*, that local suburban railways may be constructed for any distance less than ten miles from the corporate limits of any city or town, in addition to such mileage as they may have within the same, and in such case the general direction shall be given from the beginning point.
3. The place at which shall be established and maintained the principal business office of the proposed corporation.
4. The time of the commencement and the period of the continuation of the proposed corporation.
5. ~~The~~ The amount of the capital stock of the corporation.
6. The names and places of residence of the several persons forming the association for incorporation.
7. The names of the members of the first board of directors, and in what officers or persons the government of the proposed corporation and the management of its affairs shall be vested.
8. The number and amount of shares in the capital stock of the proposed corporation. [Amendment April 8, 1889; 21 Leg. p. 17.]

**ART. 4105. Corporators may proceed to act, when.**

(1.) Though a corporation may exceed its charter power in making a contract, yet, when the contract is executed and the company has received its benefits, it is estopped to deny the authority to make it. This rule applied to a case where the contract was within the general scope of the corporate authority, but not in accordance with the mode prescribed for its execution. *Railway v. Gentry*, 69 T. 625.

(2.) One owning the property and franchises of a railway company contracted to sell them to another in consideration that the purchaser was to pay a designated sum in cash (which was paid), and to deliver to the vendor certain shares of stocks and bonds of a new company to be organized under the franchise. The new company was organized, and the vendee assigned his contract to a construction company for the benefit of the new company, which had acquired the rights of the construction company. The newly organized company, by appropriate resolutions, accepted a conveyance of the property, in fulfillment of the contract, and agreed to deliver the shares of stock and bonds. In a suit against the company for specific performance of the contract, *held*, that the newly organized company was estopped to deny its substitution to the performance of

the contract. The agreement to deliver the stocks and bonds was the promise of the new company, and was a sufficiently valid consideration.

The resolutions of the new company were reduced to writing, signed by the president and secretary of the company, with the seal of the company, a copy of which, attested and signed by the secretary, was delivered to the vendor, and by him placed on record. The resolution constituted a contract in writing, within the meaning of article 3205, Revised Statutes, on which an action might be brought at any time within four years thereafter.

Such a resolution is a contract in writing, within the meaning of the statute of limitations, when it shows from its terms that it is intended as the final acceptance of a previous agreement. *Railway v. Gentry*, 69 T. 625.

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## CH. 2.—AMENDING OR CHANGING CHARTER.

**ARTS. 4108 to 4114.** See Civil Statutes.

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## CH. 3.—PUBLIC OFFICES.

**ART.**

**4115, 4115a.** See Civil Statutes.  
**4115aa, §1.** General offices, machine shops and round houses kept, where. *New.*

**ART.**

**4115aa, §2.** Special offices kept, where. *New.*  
 §3. Penalties for violation of provisions of this act. *New.*  
**4116 to 4122.** See Civil Statutes.

**ART. 4115aa, §1. General offices, machine shops and round houses kept, where.**

Every railroad company chartered by this state, or owning or operating any line of railway within this state, shall keep and maintain permanently its general offices within the State of Texas, at the place named in its charter for the locating of its general offices; and if no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this state where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general office for a valuable consideration; and if said railroad company has not contracted or agreed for a valuable consideration to maintain its general office at any certain place within this state, then such general offices shall be located and maintained at such place on its line in this state as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and round houses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and if said general offices and shops and round houses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply

as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.

**§ 2. Special offices kept, where.**

It shall be the duty of said railroad company to keep and maintain at the place within this state where its said general offices are located, the office of its president or vice-president, also the office of its secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, train master, stock and fuel agent, claim agent, and each and every one of its general offices shall be so kept and maintained, by whatever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where said general offices are required to be located and maintained, and the persons holding said general offices of a railroad shall reside at the place and keep and maintain their offices at the place where the general offices of said railroad are required by law to be kept and maintained, and if the duties of any of the above named offices are performed by any person, but his position is called by a different name, it is hereby made the duty of said railroad company to have and maintain said offices at the place where its general Texas offices are kept and maintained as required by this act; *provided*, that if the judgment of the court shall be to forfeit the charter, then it shall allow the railroad company six months from the date of the judgment within which to comply with the requirements of this act, and if said railroad shall comply within the said time no forfeiture shall occur, but if the railroad company shall not comply then the judgment shall be final, the object and meaning of this statute being to require every railroad company owning or operating a line of railway within this state to keep and maintain its general offices within this state at such place as required herein, and the name of the above as general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than the one it is required to keep its general offices at, and each and every railroad is hereby required to have and maintain its general offices at the place named herein.

**§3. Penalties for violation of provisions of this act.**

Each and every railroad company chartered by this state, or owning, operating, or controlling any line of railroad within this state, which shall violate any of the provisions of this act, shall forfeit the charter by which it operates its railroad in this state to the State of Texas, and it is hereby made the duty of the attorney-general of this state, upon the application of any interested party, or on his own motion, to proceed at once against every railroad com-

pany owning, operating, or controlling any line of railway within this state by *quo warranto* to forfeit the charter of the railroad company so offending or violating any of the provisions of this law, shall in addition to forfeiting the charter to that part of the railroad situated within this state be subject to a penalty of five thousand dollars for each and every day it violates any of the provisions of this act, said penalty to be recovered in the name of the State of Texas by a suit which shall be filed by the attorney-general in any court in this state having jurisdiction, and on the trial the court shall (if it finds that the railroad company has violated any of the provisions of this act) render judgment in the name of the State of Texas at the rate of the sum of five thousand dollars for each and every day said court shall find that said railroad company violated any of the provisions of this act. And any money recovered from any railroad company under the provisions of this act shall be paid over into the state treasury and become a part of the available public free school fund. [Act March 27; July 6, 1889; Leg. p. 130.]

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#### CH. 4.—OFFICERS OF RAILROAD CORPORATIONS.

ARTS. 4123 to 4134. See Civil Statutes.

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#### CH. 5.—BY-LAWS.

ARTS. 4135 to 4137. See Civil Statutes.

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#### CH. 6.—STOCK AND STOCKHOLDERS.

ARTS. 4138 to 4156. See Civil Statutes.

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#### CH. 7.—MEETINGS OF DIRECTORS AND STOCKHOLDERS.

ARTS. 4157 to 4165. See Civil Statutes.

## CH. 8.—RIGHT-OF-WAY.

## ART.

4166 to 4170a. See Civil Statutes.

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## ART.

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4196 to 4204. See Civil Statutes.

4205. Damages must be paid before property is taken. *Annotated.*4205a. Cross-bill may be filed. Property may be condemned. *New and annotated.*

4206 to 4208. See Civil Statutes.

## ART. 4170b. Crossings of public roads.

(1.) The owner of inclosed land who has granted the right-of-way to a railway company by deed, is entitled to such crossings over the railroad track as are reasonably necessary for the use of the premises inclosed. It is elementary law that a vendor who conveys to another land which is surrounded by the vendor's other land, impliedly grants a right-of-way over the land which is not conveyed [Washburne on Easements, 233], and it is held that "the same rule applies when the grantor conveys land surrounding a parcel retained by him." [Brigham v. Smith, 4 Gray 297; Seymour v. Lewis, 13 N. J. Eq. 444.] This is upon the doctrine that the grantor impliedly reserves a way of necessity over the premises conveyed, and the principle applies with equal force to the owner of a farm who grants a right-of-way through his inclosure to a railroad company or from whom the right-of-way is legally condemned for such a purpose. From the very nature of the transaction it is not to be presumed that the owner in the first case intended, by his grant, to cut off access from one part of his inclosure to another, or in the second, that the Legislature in authorizing the condemnation intended to bring about such a result. [Railroad v. Bost, 2 Will. Condensed App. Cases, Sec. 380.] Railway v. Rowland, 70 T. 298.

(2.) The right of the Legislature to require railway companies to construct crossings at the intersection of public highways and the maintenance of cattle guards is clearly within the scope of the police power, the exercise of which is impliedly reserved in granting the corporate franchise, and is not within the prohibition of the Federal Constitution against state laws which impair the obligation of contracts. But no implied reservation of power in the state exists to compel a railway which has fenced its track in obedience to previous laws to construct crossings within inclosures for the benefit and convenience of the owners of such inclosures.

The right of the Legislature to amend the charter of a corporation cannot be construed as placing them beyond the pale of those constitutional provisions which guard the rights and property of natural persons against the encroachments of legislative power.

[Commonwealth v. Essex Company, 73 Mass. 253, and Coiners v. Water Power Company, 104 Mass. 446, cited and reviewed.]

[This case distinguished from the case of Railroad Company v. Thorpe, 27 Vt. 140.]

A legislative act passed after a railway company has compensated the owner of land for the right to cross it, which requires the company to construct crossings of its track within its inclosures, cannot be enforced. It would be otherwise when the right-of-way is obtained after the passage of such a law; in the latter event the right-of-way will be presumed to have been acquired with reference to the law. Railway v. Rowland, 70 T. 298.

(3.) The doctrine announced in Railway v. Rowland (*ante*), to the effect that the owner of inclosed land who grants to a railway company a right-of-way through his inclosure, reserves a right to such ways over the track as are reasonably necessary to the use of his property; but that if his conveyance is absolute, in the absence of an existing statute making it the duty of the company to construct the crossings, he must put them in at his own expense. reaffirmed in this

case, and applied to crossings desired on uninclosed land. *Railway v. Ellis*, 70 T. 307.

(4.) A railway company that constructs a crossing under an agreement with the land owner whose land it appropriates for its road-bed, which it recognizes and maintains as a road crossing for the public, is estopped from setting up in action against it as a defense that it is not a public road within the meaning of the statute. Whether such crossing was in a road across the railway dedicated by the owner of the land to public use and was so used by the public, are facts for a jury to determine in a suit against the company on account of injuries inflicted by its train on one who is passing over the crossing.

The power conferred on the county commissioners to lay out, establish and change public roads, does not negative the existence of public roads otherwise established. The extent of the use of a road determines its character.

One of the chief purposes of the statute in imposing duties on railway companies in running their trains across a public road was to protect human life. That policy attaches to the crossing of every road which is in fact public, and where the extent of travel makes it the duty of the owners of railway trains to look after the safety of those using the road as a highway. *Railway v. Lee*, 70 T. 496.

**ART. 4171. Necessary culverts or sluices.**

(4.) A railway company in constructing bridges, culverts and embankments, must provide against such damages as might be reasonably anticipated from overflow of the stream, but the company will not be guilty of that culpable negligence that would make it responsible in damages if it failed to provide against such extraordinary floods as could not have been reasonably foreseen by men possessing ordinary engineering skill and capacity required in the construction of railroads. *Railway v. Pool*, 70 T. 713.

(11.) Though the measure of damages for the destruction of grass caused by an obstruction alleged to have been erected by defendant, which prevented the natural flow of water, is the value of the grass when the overflow occurred; yet when the overflow is of such long duration as to destroy the use of the land for pasturage and prevent thereafter the growth of grass, that fact may be considered as an element of damages.

If a structure placed over a stream does not obstruct the natural flow of water, except in an extraordinary flood which could not be anticipated by any ordinary prudence, no damage can be recovered for an injury from an overflow. *Railway v. Broussard*, 69 T. 617.

(12.) The measure of damages against a railway company for the destruction of growing crops and land injured or destroyed by overflow caused by the defective construction of a railroad track, is the market value of the destroyed crop at the time it was destroyed, and the injury to the land caused by the overflow. [The rule for computing damages given in *Railroad Company v. Helsley*, 62 T. 596; *Railroad Company v. Tait*, 63 T. 223, and *Railroad Company v. Johnson*, 65 T. 393, adhered to.] *Railway v. Pool*, 70 T. 713.

In a suit for damages caused by permanent injury to the land of another, the true measure of damages is the difference between the market value of the land immediately before the act complained of and its value immediately afterward. *Railway Company v. Hogsett*, 67 T. 685.

Ordinarily the measure of damages for overflowing land by an embankment for a railway improperly constructed is the loss resulting to the owner from each successive flood. A different rule prevails when the damage consists in permanent injury to the land itself; in such a case the measure of damages is the difference between the value of the land immediately before the erection of the embankment, and its value after all the damage caused by the obstruction to the water flow had been done. See opinion of a charge of court, held correct, as embracing substantially the law as above stated. *Owens v. Railway Company*, 67 T. 679.

(13.) In a suit for damages against a railway company, it was alleged that plaintiff's house was greatly injured and weakened by overflow of water, caused by defendant's railway; that the plaintiff repaired the house and occupied it until seven months after the overflow, when it was destroyed, with his furniture and stores, by a storm, and he attributed his loss to its weakened condition caused by the overflow. *Held*:

1. The plaintiff was entitled to recover only such damage as directly and necessarily resulted from the overflow; but he was not entitled to recover for an injury caused by the storm occurring seven months afterwards.

2. If the house was rendered insecure by the overflow, the plaintiff could not by his own negligence contribute to his own loss by placing goods in it, and then hold the railroad company liable for their destruction.

3. If the house was injured by the negligence of the company, the measure of damages, and plaintiff's right to recover them, were fixed before the storm came which destroyed it.

4. For such injury he would be entitled to recover such sum as would be required to restore the house to its former condition, with reasonable compensation for loss of its use while in course of repair, or to the difference between the value of the house before and after its injury, with compensation for deprivation of its use while undergoing repairs.

5. The injury from the storm was neither the ordinary or necessary result of defendant's negligence. *Railway Company v. Ware*, 67 T. 635.

In a suit to recover damages for the negligent destruction of property by the defendant, the measure of damages is the highest market value of property at the time of its destruction, and it is competent to prove its value at that time for any use to which it might have been applied. *Railway Company v. Hogsett*, 67 T. 685.

The road-bed of a railway company was so constructed as that by the damming up of water against it during a storm the house of the plaintiff, with the personal property it contained, was destroyed. In a suit for damages against the company, the jury was instructed that it was the duty of the company to use that degree of care and prudence in so constructing its road-bed so as to provide against damage to such adjacent property as a prudent, careful and cautious man would to protect himself against damage to his own property. *Held*, that there was no error.

A charge was also given to the effect that the defendant company "would not be liable for damages arising from an extraordinary or unusual rise or overflow of water, such as could not be foreseen or anticipated by the use of the greatest care, skill and caution in the construction of its road-bed." *Held*, that the defendant having failed to ask a charge to the effect that a less degree of care would have relieved it from liability, there was no error. *Railway v. Wood*, 69 T. 679.

#### ART. 4182. Mode of condemning property.

(4.) In a suit brought in trespass to try title against a railway company, which had, without condemnation, constructed its road across the land for a period long enough to bar the claim of the plaintiff for damages, the district court has no jurisdiction on the application of defendant to change the suit to one condemning the right-of-way over the land. The defendant could only obtain a condemnation in the manner pointed out by the statute. *Railway v. Poindexter*, 70 T. 98.

#### ART. 4191. Proceedings of commissioners.

(1.) Recital in the judgment of condemnation of land that due notices have been given is conclusive, although the mode of service be not shown, nor appears in the record. *Ackerman v. Huff*, 71 T. 317.

#### ART. 4195. Rule of damages.

(1.) The rule as to damages for right-of-way for a railroad is the actual value of the land condemned for the use of the road, and such consequential damages as may result from the particular manner in which the road is constructed, or shape in which the land may be taken, against which consequential damages may be set off the increased value of the land remaining, by reason of the building of the road, and if the damage is greater than the benefit, the difference may be recovered by the owner, in addition to the value of the land. [26 T. 603.] *McDonald v. T. & P. R. R.*, 1 U. C. 191.

#### ART. 4205. Damages must be paid before property is taken.

(2.) Upon the entry of a decree of condemnation of land for a railway, it is proper that the money allowed for damages be paid to the county clerk. Such payment satisfies the constitutional requirement that compensation shall be first made or secured by a deposit in money. [Const., Art. 1, Sec. 17.] *Ackerman v. Huff*, 71 T. 217.



(4.) The district court had the power to ascertain and determine whether a condemnation had been made of the right-of-way. The district court, however, could not, prior to the act of March 19th, 1889, if objected to, condemn the land in favor of a railway company in a proceeding to try the title to the land. *Ackerman v. Huff*, 71 T. 317.

**ART. 4205a. Cross-bill may be filed; property may be condemned, etc.**

When any railroad company is sued for any property occupied by it for railroad purposes or for damages thereto, the court in which such suit is pending may determine all matters in dispute between the parties, including the condemnation of the property, upon petition or cross-bill asking such remedy by defendant, but the plea for condemnation shall be an admission of the plaintiff's title to such property. [Additional article, March 19; July 6, 1889; 21 Leg. p. 18.]

## CH. 9.—OTHER RIGHTS OF RAILROAD CORPORATIONS.

**ART.**

**4209.** Shall have succession, etc. *Annotated.*

**ART.**

**4210 to 4222.** See Civil Statutes.

**ART. 4209. Shall have succession, etc.**

(8.) A corporation organized for public purposes cannot, except with the consent of the political authority which created it, render itself incapable of performing its corporate duties to the public, whether this be attempted by contract of lease, sale, or otherwise. Any such contract, made without legislative sanction, is void.

Under the statute authorizing a railway company to borrow money to construct, complete, improve or operate its road, and to give mortgages therefor, a purchaser may acquire title to the road by sale made under a power conferred in such a mortgage, or title may be acquired by purchase under judicial sale to pay such indebtedness. After such a sale the corporate existence continues, and the purchaser becomes in effect a stockholder of the corporation.

A railway company chartered under general laws cannot purchase the railway of another company; it results that, since the power to make such a purchase could not exist under an original charter of incorporation, it could not be obtained through an amended charter, in the absence of legislative permission.

Though the statute requires articles of incorporation to be passed on by the attorney-general before they can be filed with the secretary of state, and the incorporation completed, yet that officer cannot judicially determine either the purposes for which a company may be incorporated or what powers it may acquire by the act of incorporation; the law, to be construed by the judicial department, must determine both.

The rule that a corporation has only power to do such acts as its charter, considered in relation to the general law, authorizes it to do, applies to every class of corporations.

The Gulf, Colorado & Santa Fe Railway Company obtained an amended charter, under general law, which provided, among other things, that it might purchase the Central & Montgomery Railroad, and own, operate and equip the same. Certain stockholders of the Gulf, Colorado & Santa Fe Railway Company purchased all the bonds and stocks of the Central & Montgomery Railroad Company, and, after destroying the bonds, attempted to sell the latter road to the Gulf, Colorado & Santa Fe Railway Company. Possession of the road-bed, etc., was taken under the attempted sale, and the road operated and controlled as part of the Gulf, Colorado & Santa Fe Railway Company. *Held:*

1. That no title to the road passed by the purchase.

2. The Central & Montgomery Railroad Company continued as an existing corporation, and those holding its stock might complete a reorganization.

3. The Central & Montgomery Railroad Company and its property was liable for any debts incurred in its management, without regard to whose management it was subjected to. *Railway Company v. Morris et al.*, 67 T. 692.

## CH. 10.—RESTRICTIONS UPON, DUTIES AND LIABILITIES OF RAILROAD CORPORATIONS.

### ART.

4223 to 4225. See Civil Statutes.

4226. Trains to be regular, etc. *Annotated.*

4227. Penalty for refusal to transport passengers or property. *Annotated.*

4228 to 4233. See Civil Statutes.

4233a, §1. Separate coaches may be provided for passengers. *New.*

§2. Requisites of coaches; designated, how. *New.*

§3. Term, "different colors" defined. *New.*

§4. "Separate coach" defined. *New.*

§5. Unlawful intrusion into a coach a misdemeanor. *New.*

### ART.

4233a, §6. Conductors may enforce separation of passengers. *New.*

4234 to 4237. See Civil Statutes.

4238. Connecting depots; manner of keeping depots; penalty. *Amendment.*

4239 to 4246. See Civil Statutes.

4247. Consolidation of railroads prohibited. *Annotated.*

4247a to 4247a, §3. See Civil Statutes.

4247a, §4. Decree entered, when and how. *Annotated.*

4248 to 4258b, §9. See Civil Statutes.

4258b, §10. Penalty for discrimination and extortion. *Annotated.*

### ART. 4226. Trains to be regular, etc.

(1.) A railway company which leases ground near its road-bed to be used by the lessee for hotel purposes, is under no implied obligation to keep in repair or well lighted, that portion of the passway beyond its platform, leading from its road-bed to the hotel, and which is situated on the rented premises. Nor does the fact that the ground on which the hotel is erected is owned by the company render it liable for injuries which resulted from the defective or dangerous construction of the approaches or entrances to the hotel. *Railway Company v. Mangum*, 68 T. 342.

If one entitled to the rights of a passenger on a railway train is, without being guilty of contributory negligence, injured in the effort to get on the train, which has started from a stopping place before the time designated to the passenger by the conductor in charge, the company is liable in damages for the injury. *Railway Company v. Davidson*, 68 T. 370.

(3.) One who contracts with a railway company for the transportation of excursionists at reduced rates, and whose contract is afterwards, and before the excursion, repudiated by the company, after he has contracted to sell and deliver tickets at an advanced rate, may recover as damages the amount he would have received as net profits on the tickets he would have sold, after deducting expenses incurred in getting up the excursion, the amount to be arrived at by the jury from the evidence with reasonable certainty. See opinion for facts on which the rule is announced. *Railway v. Hill*, 70 T. 51.

(5.) A railroad company is bound to furnish safe cars for the transportation of all persons whether they be passengers or employes, who have the right to travel on them, and if a car be so improperly constructed as to make its use gross negligence, and such negligence is the proximate cause of an injury, an action for damages will lie. *Railway v. Ryan*, 69 T. 665.

In an action against a railway company for damages sustained by the plaintiff through the alleged negligence of the defendant in operating a hand car on which the plaintiff was riding under an invitation from a servant of the railway company, it cannot be assumed as matter of law that the act of the servant in transporting the passenger in that manner was the act of the company. The authority of the

servant to thus use a hand car, must be shown in order to render the company liable. [This case distinguished from *J. M. Prince v. International & Great Northern Railroad Company*, 64 T. 144, and *Pool v. Chicago, Milwaukee & St. Paul Railway Company*, 14 Northwestern Reporter, 46.] *Railway Company v. Cock*, 68 T. 713.

**ART. 4227. Penalty for refusal to transport passengers or property.**

(4.) Though a railway company which receives cattle for transportation may not contract to carry them on a train devoted for the trip to that exclusive purpose, or to carry the cattle at a designated rate of speed, the duty remains to carry them with reasonable dispatch, in view of the character of the freight, and its liability to injury from delay, and evidence showing neglect in this regard is admissible under proper averments in a suit against the company for damages.

If, in transporting the stock, the cars can be stopped and started without doing it so abruptly as to throw the cattle down and injure them, it is the duty of the company to do so. *Railway v. Ellison*, 70 T. 491.

(7.) In a suit against a railway company for continuous withholding and refusal to furnish facilities for shipping lumber to any place, whereby the entire products of plaintiff's mills, where the lumber was cut, were kept from market and sale, it would seem that an allegation setting forth the points to which it was desired to ship lumber, and a tender and refusal of the freight to such point, need not be averred, since a refusal to furnish facilities for transportation rendered the plaintiff unable to make contracts for delivery. *Railway v. Morris & Crawford*, 68 T. 49.

**ART. 4233a, §1. Separate coaches may be provided for passengers.**

After the taking effect of this act all railroad companies in this state who are common carriers of passengers for hire, whose trains are propelled by steam, are authorized and empowered to make provision to transport passengers of different colors in separate coaches on such trains on such portions of their road or roads as may be deemed necessary or proper. [Act April 19; July 6, 1889; 21 Leg. p. 132.]

**§2. Requisites of coaches designated, how.**

Said separate coaches shall be of equal character as to comfort, etc., and shall be designated by appropriate words and letters indicating the character of the coach.

**§3. Term, "different colors," defined.**

The words "different colors," as used in section 1 of this article, refer to what are commonly known as white people and colored people of African descent.

**§4. Separate coach defined.**

It shall be deemed a separate coach within the meaning of this article to divide the coach equally by a substantial partition with a door in same, one division of which shall be used exclusively for colored passengers and the other for white passengers.

**§5. Unlawful intrusion into a coach a misdemeanor.**

If any passenger upon a train provided with separate coaches for colored passengers shall ride or attempt to ride in a coach or division of same not designated for his or her color, after having been forbidden to do so by the employé of the railroad in charge of the train, he shall be guilty of a misdemeanor and punished by a fine of not less than five nor more than twenty dollars; *provided*, that

the railway companies shall have the right to regulate and control the travel on all other coaches in each of their said trains except the two coaches or double coach, as the case may be, provided for in this act.

**§6. Conductors may enforce separation of passengers.**

Conductors of passenger trains in this state have the power while on their respective trains to enforce the provisions of this act in reference to the separation of passengers of different colors.

[NOTE.—The foregoing act originated in the house, and passed the same March 28, 1889; and passed the Senate April 5, 1889, by a vote of 25 yeas, 1 nay. It was presented to the governor for his approval on the 6th day of April, A. D. 1889, and was not signed by him nor returned to the house in which it originated with his objections thereto within the time prescribed by the Constitution, and thereupon became a law without his signature. J. M. MOORE, Secretary of State.]

**ART. 4238. Connecting depots. Manner of keeping depots. Penalty.**

The point at which two railroads cross or intersect each other is declared to be a depot for the receipt of freight and passengers; *provided*, that this act shall not apply to crossings or intersections in or adjacent to cities and towns where a union depot is established; and it shall be the duty of each and every railroad company at each of such crossings of its road with another railroad in this state not in or within five miles of any city or town where a union depot is established, or where it is impracticable to establish a union depot, where the character of the land and grade of the roads at such crossing will admit of the same, to erect, build, and maintain, either jointly with the railroad company whose road is so crossed, or separately by each railroad company, a depot or passenger house, with room or rooms sufficient to comfortably accommodate all passengers awaiting the arrival and departure of trains from such junction or railroad crossing.

**MANNER OF KEEPING DEPOTS.** And each and every railroad company shall keep its depots or passenger houses in this state lighted and warmed and open to the ingress and egress of all passengers a reasonable time before the arrival and after the departure of all trains carrying passengers on such railroad, or both of such railroads, if at a crossing.

**PENALTY.** Each and every railroad company which shall fail, neglect, or refuse to comply with any provision of this section shall, for each day of any such failure, neglect, or refusal after this act takes effect, forfeit and pay the sum of twenty-five dollars, which may be recovered by and in the name of the State of Texas, and it shall be the duty of the attorney-general, or the district or county attorney of the district or county in which said crossing or depot is situated, to sue, prosecute for, and recover the same. [Amendment April 8; July 6, 1889; 21 Leg. p. 19.]

**ART. 4247. Consolidation of railroads prohibited.**

(1.) The fifth section of the act of 1871, incorporating the East Line Railway Company provides, among other things, as follows: "Said company is authorized, and the right is hereby granted them, to cross or connect with any other railway company, to join stocks or consolidate with any other railway company running in the same general direction;" and by the fourth section of the amendatory act of 1873 it is provided that "said company shall not have the right to rent, sell, lease or consolidate with any parallel or competing railroad in this state." By the fourth section of an act of August 7th, 1870, it was provided that the Missouri, Kansas & Texas Railway Company should have the right to purchase, sell or lease, join stocks, unite or consolidate with any connecting railroad company, by and with the approval and consent of a majority in interest of the stockholders in each company, and to acquire and merge into itself all or any part of the property, rights and privileges of such other company, upon such terms and conditions as may be agreed upon by their respective boards of directors." In a suit against the East Line & Red River Railway Company to recover damages for injuries sustained by its negligence, it sought to avoid liability by setting up that the road had been sold to the Missouri, Kansas & Texas Railway Company, *held*:

1. In order to render a sale effective, there must be both a power to sell in the vendor, and a power to purchase in the vendee.

2. If the roads were parallel or competing lines the appellant had no right to sell.

3. The fact that roads cross each other does not necessarily establish the fact that they are competing lines; whether they are or not is a matter of fact to be found by a jury.

4. The claim of the Missouri, Kansas & Texas Railway to purchase the property and franchises of another road is the assertion of a right not accorded to railways generally, either by statute or common law, and can only be recognized upon allegations and proof bringing it clearly within the terms of the statute.

5. No railway can absolve itself from liability to the public for torts, by transferring its franchises to another road, in the absence of a statute conferring the right.

6. The state violated no contract with the Missouri, Kansas & Texas Railway Company, and divested none of its rights by forbidding another road to consolidate with it, if it was a competing line.

7. Nothing passes by implication under a public grant, and the grant to the Missouri, Kansas & Texas Railway Company cannot be so construed as to curtail the powers of the state to impose restrictions in charters to be granted afterwards.

8. The East Line & Red River Railway Company cannot, while violating the provisions of its charter, prohibiting it from selling to a competing line, set up the rights of a competing line to purchase, and thus avoid liability for its torts. *Railway v. Rushing*, 69 T. 306.

The lease of a railway does not relieve lessor from liability. [68 T. 59, *Railway v. Morris*.] *Railway v. Kuehn*, 70 T. 582.

**ART. 4247a, §4. Decree entered, when and how.**

(2.) A railroad company cannot lease the right to use its road so as to absolve itself from its duties to the public without legislative authority. [*Railway v. Morris*, 68 T. 59, *supra*.] *Railroad v. Eckford*, 71 T. 274.

Without consent of the Legislature, a railway company cannot lease its track, and thereby absolve itself from its obligations to the public. *Railroad v. Moody*, 71 T. 614.

A railroad cannot lease its road to another so as to absolve itself from its duties to the public. [Following *Ry. Co. v. Morris*, 68 T. 59; *Int. & G. N. Ry. Co. v. Kuehn*, 70 T. 582.]

While it is improper in the charge to refer to the amount of damages claimed in the pleadings as the limit of the amount to be found in the verdict, yet, where the jury found greatly less than the amount claimed, and not more than they were justified under the evidence in finding, the verdict will not for that cause alone be set aside.

A verdict for five hundred dollars *held* not to be excessive in favor of a passenger holding a ticket and thrown from the platform of a car by the conductor in the manner detailed by him as follows: "The conductor took me by the right

shoulder, gave me a shove which threw me off the train and I hit the ground left shoulder first." \* \* \* "I was not 'stove up' or seriously injured but was considerably bruised." \* \* \* "I had no bones broken and no sprains—it just made me a little sore for a week—I was unable to work during that time. *Railroad Co. v. Lee*, 71 T. 538.

**ART. 4258b, §10. Penalty for discrimination and extortion.**

(23.) Appellee bought and paid for first class tickets for himself and family. The agent delivered second class—appellee not noticing the error. The conductors refused admission to first class cars, except upon payment of the additional price. This was not paid, and appellee and family were carried in second class cars. *Held*, that appellee, who was plaintiff below, was entitled to recover.

It was not the duty of the passenger holding second class tickets, having bought and paid for first class, to pay the additional price to entitle him to recover for damages to the full extent of the injury suffered from the violation of the contract.

A party whose duty it is to perform a service necessary to the fulfillment of his contract, and to prevent injury from its violation, is expected to perform such duty, and he cannot complain that extra compensation was refused on his demand conditioned to his full performance of such duty. *Railway v. Mackie*, 71 T. 492.

(26.) Passengers in a second class car are entitled to protection against the acts of fellow-passengers to the extent that good conduct must be exacted on the part of persons inclined to use of vulgar and offensive language and conduct. *Railway v. Mackie*, 71 T. 492.

(27.) Though it would ordinarily be negligence for a railway company, after stopping at a station for a passenger to alight, to again put the train in motion before a sufficient reasonable time to leave the train has elapsed; yet, if after the lapse of such reasonable time the train is again put in motion without giving signal of an intention to move, by whistle or otherwise, such act would not be negligence *per se*. There is no statute in Texas requiring a railway company to give signal of intention to move the train from a station where it may have stopped for a passenger to alight. See opinion for a charge of the court on the question of negligence held to have been error. *Railway v. Williams*, 70 T. 159.

(29.) A railway company is not liable in damages to an employé for an injury caused by his willful act of disobedience of a reasonable rule of the company established for his safety, and which is known to him, and when the act of disobedience is the proximate cause of the injury, unless the act is done under the influence of fear produced by the appearance of sudden danger. *Railway v. Ryan*, 69 T. 665.

The brake upon the caboose was defective. The handle in the car would set the brakes, but would not throw them off. While the train was in motion it was necessary for the brakeman to go upon the rear platform and down upon the lower step, and to stoop so as to throw off the brakes by using an implement brought for the purpose. While so engaged the head of the brakeman came in contact with a cattle-guard, and for the injury so received the brakeman sued. He was fully aware of the defective brake, and of the fact that many of the cattle-guards were too close to the track. *Held*:

1. The plaintiff could not recover for any injury directly resulting from the defect in the brake.

2. If, being ignorant of the condition of the cattle-guard, and it was so constructed as to be dangerous to the employés operating the trains, the plaintiff was injured, liability would ensue; and

3. Knowing that many of the cattle-guards were defective, would put the employés upon notice of their construction generally, and would throw the risk as to all upon the employés. *Railway v. Somers*, 71 T. 700.

Plaintiff, a watchman, in employ of the railway company, under order of the regular engineer, who, from sickness, was unable for duty, took charge of a working train and ran to where some pile driving was being done. The engine used in pile driving was on the rear car of the train. Plaintiff, upon stopping the train at its destination, went back to the car in which was the pile driver, boiler and engine, when its boiler exploded, injuring plaintiff; *held*, that the plaintiff was an employé and entitled to damages for injury received from imperfect implements furnished by the railway company.

Nor is the relation of master and servant dissolved from the fact that by the ordinary work of plaintiff as watchman he was not on duty at the time or place of the explosion and injury.

It was shown that a general rule of the service of the railway company forbade an engineer to give another charge of his engine; it was also shown that it was not intended that it be enforced, when, on account of sickness of the engineer, it became necessary for his duties to be performed by another; *held*, that when the exception was shown to exist it was not in conflict with the rule, that the watchman, under the direction of the engineer, and in his inability, was in charge of the engine; and in such state of facts the watchman so engaged was an employé, and entitled to protection as such.

The fact that he was not engaged in labor at the time of the injury, he being with the train in discharge of a duty the engineer had power to impose, would not for the time destroy the relation of master and servant.

Whether the act of plaintiff in leaving the locomotive when the train stopped and going to the place where the car with the pile driver was, was under the circumstances contributory negligence, was a fact for the jury.

Where there is testimony to several facts from which want of proper care may be inferred, it is not error to refuse an instruction pointing out a single fact in evidence as insufficient to prove negligence.

If the question be whether the master exercised due care to inform himself as to the competency of a servant, evidence showing what inquiry he made, and what knowledge he had or obtained through inquiry, should be considered; and it would seem if where it is contended that a master knowingly employed an incompetent servant, that it could be established by evidence tending to show that the master had been in a position to know that the servant was incompetent, or the general reputation of the servant for incompetency. *Railway v. Scott*, 71 T. 704.

(30.) A passenger on a railway car who is injured by reason of the malicious act of one not in the employ of the railway company, whereby the car was derailed, cannot recover for the damage inflicted. *Railway v. Lee*, 69 T. 556.

(31.) A railway company is bound to use a degree of caution in operating its train over the streets of a city corresponding to the danger incident thereto, when from the absence of sidewalks near the track persons may be expected to walk along and across the track. *Railway v. Walker*, 70 T. 126.

(32.) Damages resulting from personal injuries to a minor which diminish his capacity to earn a living, when claimed in a suit prosecuted for the minor's benefit by a next friend, can only be received for the period which may follow the majority of the minor. Until that period the minor would have no interest in the proceeds of his own labor. When, however, the verdict and judgment are for the plaintiff, and there is no complaint that it is excessive, the judgment will not be reversed for a failure of the charge of the court to thus limit the liability of the defendant. *Railway v. Boozer*, 70 T. 530.

(33.) The care which a railway company must exercise in regard to the safety of those who travel on their trains is not limited to such action as would not inflict injury by their negligence on persons of robust health and of ordinary physical ability; persons in feeble health, old and decrepit, are entitled to travel on their trains, and the company must exercise care accordingly.

It is negligence, for which a passenger may recover damages, for the employes of a railway company to bring a switch engine in such violent contact with its passenger car at a depot as to injure him, if he had not been allowed a reasonable time to leave the car after the train stopped, notice having been previously given that the passengers change cars. *Railway v. Rushing* 69 T. 306.

It is the duty of railroad companies to use reasonable care in selecting and furnishing to their employes implements and appliances with which the latter are to perform their duties, to see that such implements are safe and appropriate ones to be used. The care which said companies are bound to use is such as ordinarily prudent persons would employ in such matters. The care to be used is to be considered with reference to the risk to be incurred, and must be reasonably proportioned to such risk. The duty also rests upon such companies to use such care to keep the implements in good and safe repair. They are not held, however, to insure their servants against hurts from defective appliances, but only to

use the care just explained. After they have used such care they are not responsible for any hurt the servant receives while in the discharge of his duties. The servant upon entering the service assumes all risks to himself from his employment, save those which flow from the negligence of the employer in the failure to perform such a duty as that heretofore defined. The duty is also incumbent upon the servant to use reasonable care in the performance of his duties for his own protection against hurts. He is bound to use such care in using the implements as men of ordinary prudence would ordinarily use in his situation while performing the same duties resting upon him. For any injury received by him, which by the exercise of such care as is just defined he ought to have foreseen and prevented, he cannot hold the employer liable. But beyond the exercise of the care just defined the duty does not rest upon the servant to keep the instrument or tool he uses in repair, nor to search for and report defects, unless by the contract between him and the master, or by the nature of the employment, that duty is devolved upon him. His duty is to protect himself, in doing his work with the implement, against such dangers as men of ordinary prudence acting in his place and performing his duties would commonly see and provide against."

These rules are in accordance with authority of our own courts. [58 T. 288, *Ry. Co. v. Whitmore*; 64 T. 549, *T. & P. Ry. Co. v. Scott*; *id.* 600, *H. & T. C. Ry. Co. v. O'Hare*; 66 T. 526, *M. P. Ry. Co. v. Callbraith*; 66 T. 734, *T. & P. Ry. Co. v. Bradford*.] *Railway v. Crenshaw*, 71 T. 340.

A railway company cannot relieve itself from liability for an injury to an employé resulting from a failure on its part through its agents actually to use such care for the safety of employées as the law makes it necessary for such a master to use by making and enforcing regulations, unless the regulations be such and their enforcement so complete as to result in the actual use of due care.

A railway company may make regulations requiring the most rigid and frequent inspections of its machinery, road-bed and equipments, and the most prompt and complete repair of any ascertained defect, and may impose penalties of discharge, etc., for failure to comply, yet if the agent, authorized to do what the master must do to avoid liability, fails to discharge his duty, then the master is liable to an employé who suffers injury through such neglect. *Railway v. McElyea*, 71 T. 386.

In an action for damages by an employé for injury inflicted upon him by an iron slab used in covering a pit in which the employé was working falling upon his head, it had been propped upon its edge by himself with a piece of timber, as he had done before, and as he had been instructed. *Held*, that the employé was chargeable with knowledge of the danger; and, as the slab fell from not having been safely propped up, he could not recover for the injury. *Brown v. Brown*, 71 T. 355.

## CH. 11.—COLLECTION OF DEBTS FROM RAILROAD CORPORATIONS.

### ART.

4259, 4260. See Civil Statutes.

4260a, §1. Purchaser may form a new corporation. *Additional article.*

§2. Corporation shall not claim jurisdiction of federal courts. *New.*

### ART.

4261 to 4266. See Civil Statutes.

4266a, §1. Collection of claims not exceeding \$50 made, *how. New.*

§2. Concurrent remedies not affected by this act. *New.*

### ART. 4260a, §1. Purchaser may form a new corporation.

That in case of any such sale heretofore or hereafter made of the road-bed, track, franchise, or chartered right of a railway company or any part thereof as mentioned in article 4260 above, the purchaser or purchasers thereof and their associates shall be entitled



to form a corporation under chapter one of this title, for the purpose of acquiring, owning, maintaining, and operating the portion of the road so purchased as if such road or portion of the road were the road intended to be constructed by the corporation, and when such charter has been filed the said new corporation shall have all the powers and privileges conferred by the laws of this state upon chartered railroads, including the power to construct and extend; *provided*, that notwithstanding such incorporation the portion of the road so purchased shall be subject to the same liabilities, claims, and demands in the hands of the new corporation as in the hands of the purchaser or purchasers of the sold out corporation; *provided*, that by such purchase and organization no rights shall be acquired under any former charter or law in conflict with the provisions of the present constitution in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or removed.

**§2. Corporations shall not claim jurisdiction of federal courts.**

No railway company availing itself of any of the privileges herein provided shall claim to be under the jurisdiction of the federal courts by reason thereof, and any railway company which may avail itself of the said privileges which shall claim to be subject to the jurisdiction of the federal courts in pursuance of this act shall *ipso facto* forfeit its reorganization and be remanded to the same condition as it was prior to said reorganization. [Additional Article, March 29; July 6, 1889; 21 Leg. p. 19.]

**ART. 4266a, §1. Collection of claims not exceeding \$50 made, how.**

After the time when this act shall take effect any person in this state having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for over-charges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claims for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed fifty dollars, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim

and all cost of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed ten dollars, to be assessed and awarded by the court or jury trying the issue.

**§2. Concurrent remedies not affected by this act.**

Nothing in the foregoing section shall be construed to repeal or in any manner affect any provision of law now in force giving a remedy to persons having claims against railway corporations. [Act April 5, 1889; 21 Leg. p. 131.]

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## CH. 12.—LANDS OF RAILROAD CORPORATIONS.

ARTS. 4267 to 4277. See Civil Statutes.

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## CH. 13.—FORFEITURE OF CHARTER.

ART.  
4278. Forfeiture upon failure to construct road. *Amendment.*  
4278a. See Civil Statutes.

ART.  
4278b. Time for construction extended. *New.*  
4279, 4280. See Civil Statutes.

**ART. 4278. Forfeiture upon failure to construct road.**

If any railroad corporation organized under this act shall not, within two years after its articles of association shall be filed and recorded as provided in the second section of this act, begin the construction of its road, and construct, equip, and put in good running order at least ten miles of its proposed road; and if any such railroad corporation, after the first two years, shall fail to construct, equip, and put in good running order at least twenty additional miles of its road each and every succeeding year until the entire completion of its line, such corporation shall, in either of such cases, forfeit its corporate existence, and its powers shall cease as far as relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation. The provisions of this article shall not apply to or in any manner affect railway companies incorporated for the construction and operation of urban, suburban, and belt railroads for a distance of less than ten miles, as provided in clause two, of section one, of this act; *provided*, that all such companies shall, within twelve months from the date of their charter, complete a portion of their road and commence and continue the running of cars thereon. [Amendment April 8, 1889; 21 Leg. p. 17.]

**ART. 4278b. Time for construction extended.**

The time in which any railroad company is required to begin the construction of its road, and construct, equip, and put the same in

good running order, as provided for in article 4278 of the Revised Statutes of the State of Texas, is and the same shall be extended until the first day of January, A. D. 1891. And any railway company which shall have forfeited its corporate existence, rights, and powers, by reason of failure to comply with said article 4278 in less than sixty days prior to the passage of this act, shall have restored and preserved to it its corporate existence, and it shall have and enjoy all of the corporate franchises, property, rights, and powers held or acquired by it previous to any cause of forfeiture on account of such failure as aforesaid; *provided*, the benefit of this act shall not extend to any road which was chartered prior to January first, 1887; *provided further*, that this act shall not be construed to revive, restore, or extend in favor of any railroad company any contract or agreement of any kind or character between said railroad and any other person or persons, which contract or agreement has or would become void or invalid if this act were not passed. [Additional article, January 26, 1889; 21 Leg. p. 20.]

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## TITLE 85.—RECORDS.

### CH. 1.—TRANSCRIBING OLD RECORDS.

ARTS. 4281 to 4285a. See Civil Statutes.

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### CH. 2.—SUPPLYING LOST RECORDS, ETC.

ARTS. 4286 to 4293. See Civil Statutes.

## TITLE 86.—REGISTRATION.

## CH. 1.—RECORDERS AND THEIR DUTIES.

ARTS. 4294 to 4304. See Civil Statutes.

CH. 2.—ACKNOWLEDGMENT AND PROOF OF DEEDS,  
ETC., FOR RECORD.

ART.

4306. See Civil Statutes.

4306. Acknowledgment without this state, before whom made. *Annotated.*

4307 to 4309. See Civil Statutes.

4310. Acknowledgment of married woman, how taken. *Annotated.*

4311. See Civil Statutes.

ART.

4312. Form of certificate of acknowledgment. *Annotated.*

4313 to 4315. See Civil Statutes.

4316. Form of certificate of proof. *Annotated.*

4317 to 4320. See Civil Statutes.

4321. Officers are authorized to administer oaths, etc. *Annotated.*

4322 to 4328. See Civil Statutes.

ART. 4306. Acknowledgment without this state, before whom made.

(6.) No authority exists in the judge of a court of record in another state to take an acknowledgment of a deed conveying land in Texas. *Talbert v. Dull*, 67 T. 675.

A deed appeared to have been acknowledged before an officer in the State of Louisiana, who styled himself recorder, and *ex-officio* notary public. It was objected to on the ground that it was not acknowledged before an officer duly authorized by law. The acknowledgment was taken in 1878. The law then in force [Early Laws, Art. 3566, §1], as now, conferred authority upon notaries public in other states of the Union to authenticate conveyances for the purposes of registration, and the authority of a notary, who is lawfully such by virtue of his holding some other office, is quite as ample as if he were notary by direct appointment. Such is virtually the decision in *Butler v. Dunagan*, 19 T. 559, where it was held that an acknowledgment taken before a primary judge was good, by reason of his being *ex-officio* a notary public, although the statute did not in terms authorize primary judges to take such acknowledgments, and the officer did not sign as a notary public. [*Wilson v. Simpson*, 68 T. 306.]

ART. 4310. Acknowledgment of married woman, how taken.

(8.) The certificate of an officer taking a married woman's acknowledgment, which stated that she had been examined "separate" instead of "privily," was cured by the act of July 28th, 1876, validating defective certificates of acknowledgment. *McDannell v. Horrell*, 1 U. C. 521.

(12.) The fraud of the husband in obtaining his wife's signature to a deed, or the failure of the officer taking her acknowledgment to explain it to her, will not avoid the deed of a married woman, which appears to be properly executed and acknowledged, in the absence of testimony connecting the purchaser with the wrongs complained of, or privity with the parties who may have committed them. [46 T. 207; 48 T. 141; 21 T. 640; 18 T. 644; 6 T. 208.] *McDannell v. Horrell*, 1 U. C. 521.

A wife cannot defeat a conveyance of the homestead, or of her separate property, by showing that when her acknowledgment to the deed was taken she did not understand its import, or that the officer did not explain it to her, unless she also shows that these facts were brought to the knowledge of the purchaser. *Miller v. Yturria*, 69 T. 549.

ART. 4312. Form of certificate of acknowledgment.

(2.) The following certificate of acknowledgment was attached to a deed:

State of Texas,  
County of Galveston.

I, P. S. Wren, county clerk in and for Galveston county, on this day personally appeared J. L. Belbaze, known to me to be the person whose name is sub-

scribed to the foregoing and annexed instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

[SEAL] In testimony whereof, I have hereunto signed my name and affixed my seal of office, on this twenty-fourth day of February, A. D. 1886.

P. S. WREN,

Clerk of the county court of Galveston county.

*Held:* The certificate was a substantial compliance with article 4308, *ante*. *Belbaze v. Ratto*, 69 T. 636.

**ART. 4316. Form of certificate of proof.**

(4.) The certificate of the officer to the proof by a subscribing witness to a deed, when made under this article, which copies the form of the certificate in the alternative, as given in the statute, leaving it uncertain whether the witness saw the grantor sign the instrument, or heard him acknowledge his signature, is insufficient to prove the execution of the instrument. *Harvey v. Cummings*, 68 T. 599.

**ART. 4331. Officers are authorized to administer oaths, etc.**

(1.) In August, 1875, the county of Archer was not attached to Clay county, and registration of deeds for land in Archer county in the records of Clay county was of no legal effect as notice, although by common consent such registration was made. *Alford v. Jones*, 71 T. 520.

### CH. 3.—INSTRUMENTS AUTHORIZED TO BE RECORDED, AND THE EFFECT OF RECORDING.

**ART.**

4329 to 4331. See Civil Statutes.

4331a. Transcript of judgment and execution from justice's court may be recorded, when. *New.*

4332. Unrecorded instruments void, when. *Annotated.*

**ART.**

4333. Deeds, etc., to be recorded in county where land is situated.

*Annotated.*

4334. Delivery of deed to clerk operates as notice. *Annotated.*

4335 to 4342. See Civil Statutes.

**ART. 4331a. Transcript of judgment and execution from justice's court may be recorded, when, etc.**

Whenever land sold under execution or order for sale issuing out of a justice's court in this state, upon the application of any party interested in said land, it shall be the duty of the justice of the peace having the custody of the execution and judgment upon which said execution issued to make from said records a complete transcript of said judgment, and the execution issued thereon and levied on land, together with the levy and return of the officer executing the same thereon indorsed, and to certify to the correctness thereof officially, then said transcript shall be admitted to record in the county where the land is situated in the same manner in which deeds are recorded and with like effect, which said transcript, or certified copy thereof, under the hand and seal of the county clerk of the county where said transcript has been recorded, shall be admitted in evidence in all the courts in this state in like manner and with like effect that the original judgment and execution with indorsements thereon would have if offered. [Act April 6, 1889; 21 Leg. p. 133.]

**ART. 4332. Unrecorded instruments void, when.**

(1.) The registration laws do not apply to titles by inheritance, as they cannot be placed upon record, and a purchaser is bound to take notice of the relations of the parties through whom his title passes; especially so where all the parties reside in the immediate neighborhood where the conveyances are made. *Trammel v. Neal*, 1 U. C. 51.

A parol partition is not affected by the registration laws. Subsequent to such partition, a levy of an execution upon lands allotted to others than the defendant in execution would not affect the rights of those holding under the partition. *Alcock v. Kimbrough*, 71 T. 330.

(2.) A contract in relation to land may be recorded, and that it is but the evidence of an equitable title, and not of equal dignity to a deed, does not protect it against the rights of a subsequent purchaser. *Early Laws*, Art. 748 (7). *Ranney v. Hogan*, 1 U. C. 253.

(3.) The conveyance of one holding land in trust, to a purchaser without notice, for a valuable consideration, passes the legal title discharged of the trust. [*Wethered v. Boon*, 17 T. 146. 147; *Perry on Trusts*, Sec. 218; 1 *Story's Eq. Jur.*, Sec. 46c; *Adams on Eq.*, 5th Am. Ed., p. 191; *Fry on Specific Per.*, 2d Am. Ed., p. 389.] *Ranney v. Hogan*, 1 U. C. 253.

(4.) A purchaser holding under a conveyance which recites that a bond to convey the land to another had been made, that the party in whose favor it was made had failed to comply with its conditions, was dead, and the bond lost, is not, in the absence of actual notice, bound by such recitals to take notice of a prior unrecorded deed to the land.

In the absence of evidence charging a purchaser with notice beyond the recitals of his deed, he has only notice of the facts which its contents import.

A subsequent purchaser is bound by facts appearing as recognized by the recitals in the deed by his vendors, but he is not required to dispute their correctness; and if charged with notice of what does appear, he is authorized to assume the proposition contradictory to such recitals to be untrue. Notice by recitals in a deed is not notice of a state of facts contradictory to such recitals. *Graham v. Hawkins*, 1 U. C. 514.

(5.) One who buys in ignorance of a prior unrecorded deed, and who has not paid the contract price for the property, cannot be a *bona fide* purchaser. Such an one can assert no equity arising from the alleged negligence of the former purchaser, whose deed had once been recorded, and the record thereof burned. In failing to have his title established and his deed again recorded. *Evans v. Templeton*, 69 T. 375.

(6.) Giving a negotiable note for the purchase money of land, which has been assigned to an innocent holder, is equal to the payment of money, but it must appear that the land was purchased and not the title to it. [17 T. 63.]

Where the defendant pleads innocent purchase in good faith, the plaintiff is entitled to recover to the extent that the purchase money remains unpaid at the institution of the suit. *Fletcher v. Ellison*, 1 U. C. 661.

(7.) Crediting on a pre-existing debt due the firm by his vendor, the price of land conveyed by the debtor to one of the members is, as against prior equities of third parties therein, a sufficiently valuable consideration to support a conveyance of land to the vendee, where he has no notice of such equities. [*Greeneaux v. Wheeler*, 6 T. 528; *Blum v. Loggins*, 53 T. 121; *Planters' Bank v. Evans*, 36 T. 496; *Alstin v. Cundiff*, 52 T. 464; *Johnson v. Newman*, 43 T. 642.] *Rice v. Soders*, 1 U. C. 615.

(8.) Under the registration laws [*Early Laws*, Art. 748, §13], the lien fixed by a creditor, by the levy of an execution upon land, is superior to the title conveyed by a prior unregistered deed, even if the deed should be recorded between the levy and sale; and a subsequent purchaser without notice, for a valuable consideration, is entitled to a like protection. The title of a *bona fide* purchaser cannot be destroyed by the subsequent registration, and before the registration of his deed, of the prior claim or title. [*Grace v. Wade*, 45 T. 527; *Simpson v. Chapman*, 46 T. 564; *Grimes v. Hobson*, 46 T. 419; *Borden v. McRae*, 46 T. 461; *Watson v. Chalk*, 11 T. 94; *Guilbeau v. Mays*, 15 T. 415; *Watkins v. Edwards*, 23 T. 447; *Ayres v. Duprey*, 27 T. 606; *Hawley v. Bullock*, 29 T. 222; *Flannagan v. Oberthier*, 50 T. 383; *Wade on Notice*, Sec. 241.] *Ranney v. Hogan*, 1 U. C. 253.

(9.) While the lien acquired by a judgment creditor by a levy of an execution upon land of the judgment debtor is superior to the title of one claiming under an unregistered deed, yet the lien only attaches to such title as may be in the debtor, and if he has only a quit-claim deed to the land he can have no title thereto as against a prior unrecorded conveyance of his vendor, and a sale by the sheriff passes no title to the property. [Borden v. McRae, 46 T. 396; Kavanaugh v. Peterson, 47 T. 197; Grace v. Wade, 45 T. 523.] Shepard v. Hunsacker, 1 U. C. 578.

(10.) A deed which recites that the grantor conveys "all my right, title, claim and interest in and to the following described tract of land" (describing it): "and I do forever quit-claim all my claim and interest in and to the above named tract of land." is only a quit-claim deed, and passes no title to the land as against a prior unrecorded conveyance of the property. [Rodgers v. Burchard, 34 T. 452; Harrison v. Boring, 44 T. 256; Taylor v. Harrison, 47 T. 460; 11 How. 322; Washburn on Real Property, Vol. 4, 438; Wright v. Lancaster, 48 T. 255; Smith v. Pollard, 19 Verm. 272; 14 Kan. 148.] Shepard v. Hunsacker, 1 U. C. 578.

(11.) A quit-claim deed cannot exclude the operation of a prior unrecorded deed, and only conveys the interest of the grantor at the time he makes it. One claiming under it cannot be deemed a *bona fide* purchaser of any greater interest than his grantor had. [38 T. 635; 11 Wallace, 232.] Fletcher v. Ellison, 1 U. C. 661.

(12.) One who buys from heirs who sell without recourse upon them for warranty takes only such title as they own, and he is not an innocent purchaser.

A deed from the heirs of a vendor whose conveyance has never been recorded conveys no greater title than was vested in the heirs. The land having been conveyed by the unrecorded deed of their ancestor, they inherited nothing from him, and their deed will not convey anything. [34 T. 553.]

To entitle a subsequent vendee to have a prior unregistered deed postponed to his subsequent conveyance, it must appear: 1st. That he was a purchaser *bona fide*. 2d. That he purchased without actual or constructive notice of the title of the prior vendee, and that the purchase money has been paid; a recital of that fact in the deed is not sufficient. [23 T. 449; *id.* 528.] Fletcher v. Ellison, 1 U. C. 661.

(13.) A purchaser at bankrupt sale acquires only a quit-claim deed. In this case the bankrupt held under a quit-claim deed from heirs, whose ancestor had conveyed the land to another. Fletcher v. Ellison, 1 U. C. 661.

(14.) One claiming as a *bona fide* purchaser must exhibit a deed to himself and prove payment of the consideration, without notice, at the time of the delivery of the deed and payment. [Story's Eq. Jur. 1502; Watkins v. Edwards, 23 T. 447; Huyler v. Dahoney, 48 T. 238; 47 T. 459; Mitford & Tyler's Pl. & Pr. in Eq. pp. 362, 363.] His equity would be defeated by notice of a superior equity at any time before the date of the deed to him for the land. Whitsett v. Miller, 1 U. C. 203.

#### ART. 4333. Deeds, etc., to be recorded in county where land is situated.

(1.) A deed for land in Wichita county was filed for record in Montague county, to which it was attached. The certificate of record upon the deed showed that it had been "recorded in Clay county records." The deed was offered in evidence as a recorded instrument under the statute. [Rev. Stats., Art. 2257.] Held:

1. Although the deed had been properly filed for record in Montague county, yet the certificate showing the record in *Clay county records* did not show the deed to have been properly recorded, and it was properly excluded.

2. As notice, the filing was proper and was effective.

3. In connection with the deed, and to show that it had been properly recorded, the original record book was competent evidence, and its exclusion was improper; and

4. With the evidence in the record book that the deed had been properly recorded, the deed was admissible, there being no question as to the filing of the deed and notice under the statute. Land Co. v. Chisholm, 71 T. 523.

Paschal county was one of the counties created for judicial and other purposes, January 28th, 1841. This act was held unconstitutional. [Dallam. 615.] The records of the county were directed to be transferred to Red River county. [Act of February 1st, 1844.] The proceedings of the land board of Paschal county should be in the records of Red River county, and a certified copy of such records by the county clerk of that county would be evidence. Stout v. Taul, 71 T. 438.

Registration of a deed must be in that county designated by the Legislature for the record of deeds for the land affected by such deed.

The registration of deeds for lands in unorganized counties is determined by the statutes prescribing the place of such record. *Alford v. Jones*, 71 T. 519.

**ART. 4334. Delivery of deed to clerk operates as notice.**

(1.) A duly acknowledged deed was delivered to the county clerk for record with the fee to pay for recording it. Soon thereafter the court-house, with the records, including the land records and the deed, were destroyed. Upon these facts it is presumed the clerk did his duty and that the deed was duly recorded. *Harrison v. McMurray*, 71 T. 122.

For the purpose of showing that he had purchased the land in controversy without notice of a prior deed, the defendant offered to prove by a witness that at the time of the purchase of the land by his vendor he, as the vendor's attorney, examined the record of deeds in the county in which the land was situated, and found no conveyance of the land to any person. On objection this evidence was excluded.

If it be admitted that it was competent to show that the clerk's certificate was false, it must be held that the proper evidence was not offered for that purpose. To permit a witness not in charge of the office containing the registry of deeds to testify that no such record existed would be to introduce an unprecedented and dangerous practice. It is said by the Supreme Court of New Hampshire: "When a party desires to prove the negative fact that there is no record, he must do so in the usual way—by the deposition of the proper officer or by producing him in court so that he may be sworn and cross-examined as to the thoroughness of the search made. If the summoning of such officer to testify in relation to the public records at the call of a suitor shall be found impracticable by reason of interfering with his public duties, the remedy must be found in further legislation." [*Bullock v. Wallingford*, 55 N. H. 619.] The principle applicable to the point before us is, that the custodian of the records is the proper officer to prove that a record does not exist. The court below did not err in excluding the testimony. *Edwards v. Barwise*, 69 T. 84.

(13.) Registration of a deed is notice only to one claiming under the grantor in the recorded deed. A junior purchaser of land is chargeable not only with notice of the contents of registered deeds in the chain of title, but when the mesne conveyances contain that which should put a prudent man on inquiry, he is chargeable with notice of whatever an inquiry would have revealed. *Jenkins v. Adams*, 71 T. 1.

(18.) The possession of land by a purchaser through his tenant, though his deed is unrecorded, operates as notice of the purchaser's rights to a creditor in whose favor a levy is made of an execution on the property. The purchaser under such execution, who has actual notice of such deed at the execution sale, cannot be an innocent purchaser, as he would be if the creditor had acquired the lien secured by levy unaffected by the constructive notice resulting from the possession of the tenant. *Glendenning v. Bell*, 70 T. 632.

Possession is taken under a title bond not recorded. That part occupied is not in dispute. As to that part which is in dispute, such possession is not notice.

There being no record of the title bond, nor possession of the land sold, nor evidence of notice by a purchaser of the land sold, such purchaser would hold against the elder unrecorded title bond. *Wright v. Lassiter*, 71 T. 641.

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## CH. 4.—REGISTRATION OF SEPARATE PROPERTY OF MARRIED WOMEN.

**ARTS. 4343 to 4349.** See Civil Statutes.

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## CH. 5.—GENERAL PROVISIONS.

**ARTS. 4350 to 4358.** See Civil Statutes.

(26—Sup. Tex. Stat.)

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## TITLE 87.—ROADS, BRIDGES AND FERRIES.

## CH. 1.—ESTABLISHMENT OF PUBLIC ROADS.

## ART.

4359, 4359a. See Civil Statutes.

4360. Power and duty of commissioners' court to open roads. *Amendment and annotated.*

4360a. See Civil Statutes.

4360b, §1. Roads opened across lands owned and used by the state, when. *New.*§2. Conflicting laws repealed. *New.*

4361 to 4390a. See Civil Statutes.

4390a, §1. Road commissioners; appointment, bond and compensation of. *New.*§2. Authority and duty of road commissioners. *New.*§3. Money expended, how. Convicts may be worked. Overseers may be employed. Hands not required to work, when. *New.*

## ART.

4390a, §4. Report of commissioners, when and how made. *New.*§5. Neglect of duty a misdemeanor. *New.*§6. Road and bridge fund expended, how. *New.*§7. Commissioners' court shall make rules, etc. May purchase or hire teams, etc. *New.*§8. Donations of money, etc., may be accepted. Land owners may construct drains. *New.*§9. Act is cumulative. Not more than five days' service required. *New.*

4390aa to 4390c. See Civil Statutes.

**ART. 4360. Power and duty of commissioners' court to open roads.**

The commissioners' courts of the several counties shall have full powers and it shall be their duty to order the laying out and opening of public roads when necessary, and to discontinue or alter any road whenever it shall be deemed expedient as hereinafter prescribed; *provided*, that hereafter no public road shall be altered or changed except for the purpose of shortening the distance from the point of beginning to the point of destination, unless the court upon a full investigation of the proposed change find that the public interest will be better served by making the change. That said change shall be by unanimous consent of all the commissioners elected. [Amendment April 2; July 6, 1889; 21 Leg. p. 21.]

**ART. 4360. Power and duty of commissioners' court to open roads.**

(1.) The county court, on the 30th of September, 1876, adopted the report of a jury of view laying out a public road. The overseer who was ordered to lay out the road in accordance with the report adopted another line on which a road was opened and used until Nov. 22d, 1884, when the road so opened across the land of A. was recognized by the court as a public road; *held*, that A. could not have brought an action against the county for the unauthorized establishment of the road in 1876, and that a cause of action did accrue when the court by its order in 1884 asserted a claim to the use of the land. *Franklin County v. Brooks*, 68 T. 679.

(2.) When land is actually appropriated under an order of the commissioners' court, requiring a jury to lay out and mark a public road, a subsequent purchaser of the tract of land crossed by the road takes it subject to the easement thereby created and existing at the date of purchase. The public use for a less period of time than would give a right by prescription would not appropriate the way used beyond that character of road designated in the order establishing it. Thus,

if the original order established a third class road, the commissioners' court cannot change its classification arbitrarily, without notice or further proceedings, to a second class road, and require the removal of gates, thereby imposing an additional burden without compensation. Such action would be violative of the seventeenth section of the Bill of Rights. *Wooldridge v. Eastland County*, 70 T. 680.

**ART. 4360b. Roads opened across lands owned and used by the state, when, etc.**

§1. No public road shall be opened across lands owned and used or for actual use by the state, educational, eleemosynary, or other public state institutions for public purposes and not subject to sale under the general laws of the state, without the consent of the trustees of said institution and the approval of the governor of the state, and the roads heretofore opened across such lands may be closed by the authorities in charge of any such lands whenever they deem it necessary to protect the interests of the state, upon repayment to the county where the land is situated, with eight per cent. interest, the amount actually paid out by said county for the condemnation of said lands as shown by the records of the commissioners' court.

**§2. Conflicting laws repealed.**

All laws and parts of laws in conflict with this act are hereby repealed. [Act March 26, 1889; 21 Leg. p. 134.]

**ART. 4390a, §1. Road Commissioners; appointment, bond, and compensation of.**

Each county commissioners' court of this state may employ not exceeding four road commissioners for their respective counties, who shall be resident citizens of the district for which they are employed, and when more than one is employed, the district that each road commissioner is to control shall be defined and fixed by the court; such road commissioners when employed shall receive such compensation as may be agreed upon by the court, not to exceed two dollars per day for the time actually engaged. Each road commissioner when employed, before he enters upon his duties, shall execute a bond, payable to the county judge of the county and his successors in office, in the sum of one thousand dollars, with one or more good and sufficient sureties, to be approved by the county judge, and conditioned for a faithful performance of his duties.

**§2. Authority and duty of road commissioners.**

A road commissioner when employed shall have control over all overseers, hands, tools, machinery, and teams to be used upon the roads in his district; and shall have the power to require overseers to order out his hands in any number he may designate for the purpose of opening, working, or repairing the roads or building or repairing bridges or culverts of his district; and it shall be the duty of such road commissioners to see that all the roads and bridges of

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his district are kept in good repair, and he shall, under the direction and control of the commissioners' court, inaugurate a system of grading and draining public roads in his district, and see that such system is carried out by the overseers and hands under his control, and shall obey all orders of the commissioners' court; and he shall be responsible for the safe keeping and liable for the loss or destruction of all machinery, tools, or teams placed under his control, unless such loss is without his fault, and [when] he shall be discharged he shall deliver them to the person designated by the court.

**§3. Money expended, how. Convicts may be worked. Overseers may be employed. Hands not required to work, when.**

He shall expend such money as may be placed in his hands by the commissioners' court under its direction in the most economical and advantageous manner on the public roads, bridges and culverts of his district; and all his acts shall be subject to the control, supervision, orders, and approval of the commissioners' court.

**CONVICTS MAY BE WORKED.** He shall work the convicts and such other labor as may be furnished him by the commissioners' court.

**OVERSEERS MAY BE EMPLOYED.** And when the road commissioner shall have funds in his hands to expend for labor on the roads, and it shall be necessary for any overseer or overseers in his district to work more than five days during any one year upon the public roads, he may employ such overseers to continue their duties as such for such a length of time as may be necessary, and pay them for their services not more than one dollar and fifty cents per day for the time actually employed after the five days.

**HANDS NOT REQUIRED TO WORK, WHEN.** *Provided*, that hands shall not be required to work when there shall be on hand, after building and repairing bridges, a sufficient road fund to provide for the necessary work on the roads.

**§4. Report of road commissioner, when and how made.**

Said road commissioner shall report to the commissioners' court at each regular term, under oath, showing an itemized account of all money he has received to be expended on roads or bridges and what disposition he has made of the money, and showing the condition of all roads, bridges and culverts in his district, and such other facts as the court may desire information upon, and shall make such other reports and at such time as the court may desire.

**§5. Neglect of duty a misdemeanor.**

Any road commissioner who shall willfully fail to comply with any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine of not less than twenty-five nor more than two hundred dollars.

**§6. Road and bridge fund expended, how.**

The commissioners' court shall see that the road and bridge fund of their county is judiciously and equitably expended on the roads and bridges of the county, and as nearly as the condition and necessity of the roads will permit, it shall be expended in each county commissioners' precinct in proportion to the amount collected in such precinct; and in expending money in building permanent roads the money shall first be used only on first or second class roads, and on those which shall have the right-of-way furnished free of cost to make as straight a road as is practicable to obtain and having the greatest bonus offered by the citizens of money, labor, or other property.

**§7. Commissioners' court shall make rules, etc.; may purchase or hire teams, etc.**

The commissioners' courts are authorized to make all reasonable and necessary rules and orders for the working and repairing of public roads, and to utilize the labor to be used and money expended thereon, not in conflict with the laws of this state, and enforce such rules and orders; and they are further authorized to purchase or hire all necessary road machinery, tools, or teams, and hire such labor as may be needed in addition to the labor now required of citizens to build or repair the roads.

**§8. Donations of money, etc., may be accepted. Land owners may construct drains.**

Commissioners' courts or road commissioners may accept donations of money, lands, labor of men, teams or tools, or any other kind of property or material to aid in building roads in their counties, and may authorize any person to make a drain along any public road for the purpose of draining his land, and require the person draining his land to do such work under the direction of the road commissioner.

**§9. Construction of this act.**

This act shall not be construed to repeal any existing law, but it is cumulative and in aid of the existing law; *provided*, that when road commissioners are employed the county commissioners are not required to supervise the roads as required by article 4390a, Revised Statutes; *provided*, nothing in this law shall be construed so as to require more than five days' service in one year of any citizen. [Act April 6, 1889; 21 Leg. p. 134.]

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**CH. 2.—APPOINTMENT OF OVERSEERS.**

ARTS. 4391 to 4404. See Civil Statutes.

T.87, CHS. 3, 4.] ROADS, BRIDGES AND FERRIES. Arts. 4410—4429a.

### CH. 3.—PERSONS LIABLE TO WORK ON ROADS, AND THEIR RIGHTS AND DUTIES.

ART.  
4405 to 4409. See Civil Statutes.  
4410. Duty of hand to work, etc.  
*Amendment.*

ART.  
4411. See Civil Statutes.

#### ART. 4410. Duty of hand to work, etc.

It shall be the duty of each road hand to perform his duties as such in accordance with the directions of his overseer, and a day's work, within the meaning of this act, shall be eight hours efficient service, when said service is voluntarily performed. [Amendment April 2; July 6, 1889; 21 Leg. p. 21.]

### CH. 4.—POWERS AND DUTIES OF OVERSEERS.

ART.  
4412. See Civil Statutes.  
4413. Power to call out hands. *Amendment.*  
4414 to 4429. See Civil Statutes.

ART.  
4429a. Inefficient hands may be dismissed; proceedings against.  
*New.*

#### ART. 4413. Power to call out hands.

Overseers of roads shall have the power to call out all persons liable to work upon public roads at any time such overseer may deem it necessary, or when ordered by the commissioners' court or other competent authority, and such hands may be called out in detail, or the whole force at any one time, as may be deemed best, or as they may be directed, for the better improvement of the public roads. [Amendment April 2; July 6, 1889; 21 Leg. p. 21.]

#### ART. 4429a. Inefficient hands may be dismissed; proceedings against.

Overseers shall dismiss from the road any hand or hands, whether working for themselves or as substitutes for others, who shall fail to do good and efficient work, or who shall hinder other hands from doing their work properly, or dismiss any hand that may be intoxicated, or who shall refuse to obey any reasonable order of the overseers; and the overseer shall proceed against such hand or hands so dismissed in the same manner as if they had refused to obey the summons to work upon the road. [Additional article, April 2; July 6, 1889; 21 Leg. p. 21.]

## CH. 5.—BRIDGES.

ART.

4430 to 4433. See Civil Statutes.

4434. Expenses when streams form  
dividing line of counties.  
*Amendment.*

ART.

4435. See Civil Statutes.

**ART. 4434. Bridges over streams dividing lines of counties.**

Whenever any stream is the division line between counties, or when two or more counties are jointly interested in bridges, it shall be lawful for the counties so divided or interested to jointly erect bridges over said dividing stream, upon such equitable terms as the commissioners' court of each county interested may agree upon; and if the commissioners' court of the counties so divided by such stream, or interested in the construction of such bridge, shall fail to agree upon the terms of construction of such bridge, or the place where such bridge shall be placed over such dividing stream, then it shall be lawful for either county to erect a bridge or bridges over such dividing stream, and for this purpose the county commissioners' courts of either county shall have the same authority and power to issue the bonds of the county as is now conferred upon said courts for the purpose of buying and constructing bridges for public use within the county. [Amendment March 6, 1889; 21 Leg. p. 22.]

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CH. 6.—FERRIES.

ARTS. 4436 to 4456. See Civil Statutes.

## TITLE 88.—SALARIES.

### CH. 1.—EXECUTIVE AND DEPARTMENT OFFICERS.

ART.  
4457 to 4465. See Civil Statutes.  
4466. Salary of superintendent of public buildings. *Amendment.*

ART.  
4467. See Civil Statutes.

ART. 4466. Salary of superintendent of public buildings.

The superintendent of public buildings shall receive an annual salary of not to exceed one thousand five hundred dollars. [Amendment March 29; July 6, 1889; 21 Leg. p. 22.]

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### CH. 2.—JUDICIAL OFFICERS.

ARTS. 4468 to 4476. See Civil Statutes.

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### CH. 3.—OFFICERS OF PENITENTIARIES.

ARTS. 4477 to 4480. See Civil Statutes.

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### CH. 4.—GENERAL PROVISIONS.

ART.  
4481. Salaries shall not be changed. *Annotated.*

ART.  
4482 to 4485. See Civil Statutes.

ART. 4481. Salaries shall not be changed.

(1.) An office is property, and he who is legally its incumbent is entitled to its emoluments during the term for which he is elected or appointed. *Bastrop County v. Hearn*, 70 T. 563.

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## TITLE 89.—SEALS AND SCROLLS.

ARTS. 4487, 4493. See Civil Statutes.

## TITLE 90.—SEQUESTRATION.

**ART.**

4489. See Civil Statutes.

4490. Affidavit, and what it shall contain. *Annotated.*

4491. See Civil Statutes.

4492. Bond for the writ. *Annotated.***ART.**

4493 to 4506. See Civil Statutes.

4507. Defendant not required to account for hire, etc., when. *Annotated.*

4508 to 4513. See Civil Statutes.

**ART. 4490. Affidavit, and what it shall state.**

(2.) The petition, which stated the facts for sequestration, was sworn to, and showed that the logs in controversy were cut off of certain tracts of land by Boykin, and that they had to be floated to the place where, under the mortgage, they were to be put, and there is no pretense that there were any other logs answering the description given in the petition. One of the methods which the law has required for the identification of logs to be floated or rafted, is a brand. [Civil Statutes, Art. 4783a.] The logs in question were described by a brand as well as otherwise, and whether the brand had, at the time, been so recorded as to make it, under the the statute, evidence of ownership, it was, under the facts of this case, sufficient to identify the logs, the other matters of description required by the statute having been fully given. It would be very difficult more accurately to describe such property.

It might as well be asked, in case of the application for a writ of sequestration to seize a stock of cattle bearing one brand, that a particular description of each animal should be given in addition to the brand. The law does not require the impracticable. *Boykin v. Rosenfield Co.*, 69 T. 115.

**ART. 4492. Bond for the writ.**

(1.) When sequestration is sought against several who are jointly sued, it is not necessary that the plaintiff should execute bond separately to each defendant. *Boykin v. Rosenfield*, 69 T. 115.

(5.) The plaintiff, in a proceeding by sequestration, who by his conduct ratifies the conduct of a sheriff who has abused the process of the court by the oppressive and harsh manner in which he executed it, so that injury thereby resulted to the defendant, is responsible therefor. *Casey v. Hanrick*, 69 T. 44.

**ART. 4507. Defendant not required to account for hire, etc., when.**

(1.) If the owner of property incumbered by a lien so acts as to compel the lien holder, in his own protection, to sequester it, such owner is not entitled to a credit for the value of the rents of the property during the time it is held by the officer in obedience to the writ. *Bumpass v. Morrison*, 70 T. 756.



## TITLE 91.—SHERIFFS AND CONSTABLES.

## CH. 1.—OF SHERIFFS.

ART.

4514 to 4519. See Civil Statutes.  
4520. Sheriff may appoint deputies.  
*Amendment and annotated.*

ART.

4521 to 4530. See Civil Statutes.

## ART. 4520. Sheriff may appoint deputies.

Sheriffs shall have power by writing to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, who shall have power and authority to perform all the acts and duties of their principals, and every person so appointed shall, before he enters upon the duties of his office, take and subscribe to the oath of office prescribed by the Constitution, which shall be indorsed on his appointment, together with the certificate of the officer administering the same, and such appointment and oath shall be recorded in the office of the county clerk and deposited in said office; *provided, however, that the number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the justice's precinct in which is located the county site of such county; and a list of these appointments shall be posted up in a conspicuous place in the clerk's office so that all can see them; provided further, that no person shall be appointed a deputy sheriff who stands convicted for a felony, and an indictment for a felony of any deputy sheriff appointed shall operate a revocation of his appointment as such deputy sheriff; provided, that any sheriff may appoint one deputy in addition to the above enumerated for each justice's precinct in addition to the precinct where the county site is situated; and all sheriffs having more deputies than are provided for in this act shall make the number of his deputies conform to the provisions of this act.* [Amendment April 6; July 6, 1889; 21 Leg. p. 23.]

(1.) All writs, including attachments, are directed to the sheriff or any constable, but may be executed by a deputy sheriff, who makes his return in the name of his principal. So far as the public is concerned, there is no difference between the powers and duties of the sheriff and his deputy; either can perform and can be compelled to perform the same acts that are required of the other. When a writ reaches the hands of a deputy it is in fact received by the principal. He is liable for its proper enforcement, and for all acts done by his deputy under its authority. If goods are tortiously seized under it by the deputy, the principal can be sued by the owner; if they are illegally disposed of by the deputy, the principal is responsible.

As between the sheriff and the deputy, of course the former can make the latter responsible for such losses or misconduct, but with this the public has no concern. It follows that as to the public, whose servants these officers are, the acts of the deputy are the acts of the principal—the possession of the former is the possession of the latter. So far as the responsibilities of the office are concerned, the sheriff is liable for the acts both of himself and his deputy; so far as its rights and duties are concerned, they are in every respect identical. This is not only the true construction of our statute, but is clearly the rule at common

T. 91, CH. 2; 92.] SHERIFFS, ETC.—STATISTICS, ETC. Arts. 4533, 4544a

law. [Bacon's Abridgement, title Sheriff; Comyn's Digest, title Officer; Gwynne on Sheriffs, 48; Murree on Sheriffs, section 18.]

The acts of the deputy are performed in the name of the principal, and they become so essentially the acts of the latter that he may lawfully return that they were done by himself. [Freeman on Executions, Sec. 384.] From these principles we can but conclude that the act of a deputy in making the levy of an attachment upon a stock of goods was the act of the sheriff, and amounted to the same thing as if he had made the levy himself. As the goods were in the possession of the sheriff under a former attachment, it was, of course, proper for him to levy a subsequent writ upon them, subject to the previous levy made by his deputy. *Heye & Co. v. Moody & Co.*, 67 T. 615.

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CH. 2.—OF CONSTABLES.

ART.

4531, 4532. See Civil Statutes.

4533. Bond and oath. *Annotated.*

ART.

4534 to 4542. See Civil Statutes.

ART. 4533. Bond and oath of constable.

(1.) The sureties on a constable's bond are only liable for his official acts or defaults committed after its execution. *Cole v. Crawford*, 69 T. 124.

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TITLE 92.—STATISTICS AND HISTORY.

[See, *ante*, title 2a, Agriculture, Statistics, and History, Department of.]

ART.

4543, 4544. See Civil Statutes.

4544a. Officer refusing to give statistics guilty of a misdemeanor. *Amendment.*

ART.

4545 to 4555. See Civil Statutes.

ART. 4544a. Officer refusing to give statistics guilty of a misdemeanor.

If any state or county officer shall fail or refuse to give such data, statistics, and information as herein provided, such state or county officer shall be guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than twenty-five nor more than one hundred dollars. [Additional Article, April 2, 1889; 21 Leg. p. 23.]

## TITLE 93.—STOCK LAWS.

## CH. 1.—OF MARKS AND BRANDS.

## ART.

4556. Owners of stock to have mark and brand. *Annotated.*

4556a to 4559. See Civil Statutes.

## ART.

4560. Marks and brands to be recorded. *Annotated.*

4561. Unrecorded brands not evidence. *Annotated.*

## ART. 4556. Owners of stock to have mark and brand.

(1.) Though the statute provides that an individual shall have but one mark and brand for his cattle, yet, if cattle be removed by the owner from a county in which his brand is recorded, and from any reason he causes to be recorded a different brand in the county to which the cattle are removed, the new brand does not invalidate the old one, nor deprive the owner of any benefit accruing from its registration. *McClure v. Sheek's Heirs*, 68 T. 426.

The owner of stock had his brand recorded in T. county where he then lived. Afterwards he removed to C. county, and his stock ran in T. and C. counties and in an adjoining county. It was held that the record of the brand in T. county was evidence of ownership of stock stolen in C. county. *Thompson v. State*, 26 App. 466.

## ART. 4560. Marks and brands to be recorded.

(1.) A certificate of the county clerk of Y. county to a copy taken from the record of marks and brands was as follows: "The State of Texas, County of Young. I, Chas. O. Jolim, clerk of the county court in and for said county, do hereby certify that the foregoing is a true copy of the record and brand of Wilkins Bros." *Held*, in a criminal case sufficient to show that the mark and brand was recorded in Young county. *Byrd v. State*, 26 App. 374; *Thompson v. State*, 26 App. 466.

## ART. 4561. Unrecorded brands not evidence.

(1.) Marks and brands, which would otherwise be intrinsically evidence of ownership, are admissible to prove ownership only when they have been duly recorded. *Thompson v. State*, 26 App. 466.

## CH. 1a.—OF DESTRUCTION OF WOLVES.

ART. 4561a. See Civil Statutes.

## CH. 2.—OF THE SALE, SLAUGHTER AND SHIPMENT OF ANIMALS.

## ART.

4562, 4563. See Civil Statutes.

4564. Stock animals sold by mark and brand. *Annotated.*

## ART.

4565 to 4569. See Civil Statutes.

## ART. 4564. Stock animals sold by mark and brand.

(1.) For a sale of live-stock not running at large in the range, a bill of sale is required by the statutes as evidence of title, and in default of it the *prima facie* presumption obtains that the possession by one claiming to be a purchaser is illegal. If the live-stock consists of cattle running on the range, a bill of sale and record thereof are absolutely prerequisite to the acquisition of title; and if the instrument be not recorded, it does not take effect in favor of any one for any purpose. *Black v. Vaughan*, 70 T. 47.

## CH. 3.—OF ESTRAYS.

ARTS. 4570 to 4591 See Civil Statutes.

## CH. 4.—OF THE MODE FOR PREVENTING CERTAIN ANIMALS FROM RUNNING AT LARGE IN COUNTIES AND SUBDIVISIONS.

ARTS. 4592 to 4610. See Civil Statutes.

## CH. 5.—REGULATIONS FOR THE PROTECTION OF STOCK RAISERS IN CERTAIN LOCALITIES.

## ART.

4611 to 4658. See Civil Statutes.  
4659, §1. Counties excepted from these regulations. *Amendment.*

## ART.

4659, §2. Counties placed under stock law.

§3. Counties exempt from stock law.

**ART. 4659, §1. Counties excepted from these regulations.**

The counties of Anderson, Austin, Angelina, Bell, Bowie, Brazos, Bastrop, Bosque, Burleson, Brazoria, Caldwell, Camp, Calhoun, Cass, Chambers, Cherokee, Collin, Colorado, Cooke, Dallas, Delta, Denton, Ellis, Erath, Fannin, Franklin, Falls, Freestone, Gonzales, Eastland, Stephens, Fayette, Fort Bend, Galveston, Goliad, Grayson, Gregg, Grimes, Hardin, Harrison, Hays, Henderson, Hill, Hood, Hunt, Hopkins, Houston, Jackson, Jasper, Jefferson, Johnson, Kaufman, Lamar, Lee, Leon, Lampasas, McLennan, Madison, Marion, Montgomery, Montague, Morris, Nacogdoches, Newton, Orange, Panola, Parker, Polk, Palo Pinto, Rains, Red River, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, Shackelford, Shelby, Smith, Tarrant, Titus, Trinity, Tyler, Upshur, Van Zandt, Walker, Washington, Wharton, Wise, Wood, Jack, Harris, Clay, Young, Wheeler, Lavaca, Nueces, Bee, Refugio, Limestone, San Patricio, Somervell, Matagorda, Victoria, Milam, Live Oak, Williamson, Brewster, Cameron, El Paso, Encinal, Duval, Presidio, Webb, Mills, Liberty, and Travis county, to take effect after the next general election, are hereby exempt from the operations of this act, and that the provisions of the same shall in no wise relate or apply to the aforesaid counties.

**INSPECTORS.** *Provided,* that in those counties bordering on the line of the state, except those bordering on Red River and the Rio Grande and the counties of Nueces and Cameron, whether organized or unorganized, the governor shall appoint an inspector whose duty it shall be to inspect under the provisions of this act all stock

about to be driven or shipped out of the state. Where there is a depot or place for the shipment of cattle, no inspector of hides and animals shall be elected, but one for each of such counties, except the counties of Nueces and Cameron, shall be appointed by the governor and confirmed by the senate, who shall hold office for two years and until his successor shall be appointed and confirmed; said inspector so appointed to take the constitutional oath of office and give the bond now required of inspectors of hides and animals, and such inspector shall receive the same fees now allowed to inspectors of hides and animals, and perform the same duties; *provided*, that such cattle shall not be subject to inspection on board of any railroad, unless the same have been placed on board of such train for the purpose of evading the provisions of this act.

**EXEMPTION FROM INSPECTION.** *And provided, further*, that the counties of Limestone, Fayette, Lavaca, Gonzales, Colorado, Bell, Calhoun, Cameron, Duval, Encinal, Webb, Zapata, Starr, Hidalgo, Hays, Guadalupe, Caldwell, Blanco, Llano, Kendall, Comal, Houston, Austin, Jackson, Victoria, Freestone, Hamilton, Williamson, Milam, Live Oak, Harris, Bosque, Erath, Hood, Somervell, Liberty, and Fannin counties shall be exempt from all laws regulating inspection of hides.

**§2. Counties placed under stock law.**

That the counties of Wichita, Wilbarger, Hardeman, Childress, Donley, Armstrong, Carson, Potter, Oldham, Hartley, Dallam, Gray, Hemphill, Roberts, Lipscomb, Callahan, Taylor, Nolan, Mitchell, Howard, Martin, and Karnes be placed under the operations of the inspection laws now in force and which may be in force under the provisions of this act.

**§3. Counties exempt from stock law.**

That the counties of Jones, Fisher, Scurry, Borden, Dawson, Grimes, Yoakum, Terry, Lynn, Garza, Kent, Stonewall, Haskell, Throckmorton, Baylor, Knox, King, Dickens, Crosby, Lubbock, Hockley, Cochran, Bailey, Lamb, Hall, Floyd, Motley, Cottle, Hale, Briscoe, Swisher, Castro, Parmer, Deaf Smith, Randall, Ochiltree, Hansford, Hutchinson, Moore, Sherman, Harris, Glasscock, and Liberty are hereby exempt from the operation of the stock law. [Amendment March 29; July 6, 1889; 21 Leg. p. 46.]

## CH. 6.—REGULATIONS FOR SLAUGHTERING CATTLE.

ART. 4659a. (*New.*)

- §1. Butchers, etc., required to give bond; conditions of.  
§2. Failure to give bond, a misdemeanor.  
§3. Failure to keep a record or to have hides inspected, a misdemeanor.  
§4. Purchase of slaughtered animals without hides, etc., a misdemeanor.

ART. 4659a. (*New.*)

- §5. Refusal to permit inspection of a record, a misdemeanor.  
§6. Failure to produce hide and ears on demand, a misdemeanor.  
§7. Suit may be brought on bond for benefit of county school fund.  
§8. Inspector's duties and fees; failure to keep a record, a misdemeanor.  
§9. Counties exempted from this regulation.

**ART. 4659a, §1. Butchers, etc., required to give bond; conditions of.**

Every person, before he shall set up and carry on the trade of a butcher or slaughterer of cattle, in the State of Texas, shall file a bond, to be approved by the county judge of the county in which he desires to carry on the business, in a sum of not less than five hundred dollars nor more than five thousand dollars, payable to the State of Texas, conditioned that he shall keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, with a description of the animal, including marks, brands, age, weight, and from whom purchased, and the date thereof; that he will have the hide and ears of such animal inspected by the inspector or some magistrate of the county within five days after it is slaughtered; and that he will not purchase any cattle that has been slaughtered by another, unless the hide and ears of such slaughtered animal accompanying said animal offered for sale; and that he will not purchase any animal that has been slaughtered by another, when the ear-marks or brands on the hide accompanying such animal, when offered for sale, have been changed, mutilated, or destroyed.

**§2. Failure to give bond, a misdemeanor.**

Every person who shall be found carrying on the business of butcher or slaughterer, in the State of Texas, without having filed the bond provided in section one of this act, shall be deemed guilty of a misdemeanor and be fined in a sum of not less than fifty nor more than two hundred dollars for every day he shall carry on such business.

**§3. Failure to keep a record of purchases, or to have hides inspected, a misdemeanor.**

Every person who shall carry on the business of butcher or slaughterer of cattle, and shall fail to keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, together with a description of each animal, including mark, brand, age, weight, and from whom purchased, and the date thereof, or shall fail to have the hide and ears of such an-

mal or animals inspected by the inspector or some magistrate of the county within five days after such animal is slaughtered, shall be deemed guilty of a misdemeanor, and for each offense fined in a sum not less than twenty-five nor more than two hundred dollars.

**§4. Purchase of slaughtered animals without hide and ears, or with altered marks and brands, a misdemeanor.**

Every person who shall carry on the business of butcher or slaughterer of cattle, and shall purchase any cattle that has been slaughtered by another without the hide and ears of such animal accompanying the same, or who shall purchase any animal that has been slaughtered by another when the ear-mark or brands on the hide accompanying the same when offered for sale have been changed, mutilated, or destroyed, shall be deemed guilty of a felony, and may upon conviction be punished by a fine not less than twenty-five nor more than five hundred dollars, or by confinement in the penitentiary for a term of not less than one nor more than three years, or by both fine and imprisonment, at the discretion of the jury trying the same.

**§5. Refusal to permit inspection of record, a misdemeanor.**

The record provided for in section 3 of this act shall be open to inspection of all persons, and any butcher or slaughterer refusing to permit such inspection or examination shall be deemed guilty of a misdemeanor, and, on conviction, fined in a sum not less than twenty-five nor more than two hundred dollars for each offense.

**§6. Failure to produce hide and ears on demand, a misdemeanor.**

Any person who shall slaughter any cattle and offer the same for sale, or shall sell the same, and shall fail or refuse to produce the hide and ears of such slaughtered animal within the time prescribed by this act upon the demand of any officer of the county in which said animal is offered for sale, shall be deemed guilty of a felony, and on conviction may be fined in any sum not less than twenty-five dollars nor more than five hundred, or by confinement in the penitentiary for a term of not less than one nor more than five years, or by both such fine and imprisonment, in the discretion of the jury trying the same.

**§7. Suit may be brought on bond for benefit of county school fund.**

Any butcher or slaughterer of cattle who shall violate any of the conditions of the bond referred to in section 1 of this act, in addition to the penalty prescribed in the preceding articles of this act, may be sued upon his bond at the instance of the county or district attorney of the county where such bond is given, and all sums recovered by suits upon said bonds shall be paid into the county

treasury and become a part of the available school fund of such county.

**§ 8. Inspector's duties and fees; failure of to keep a record, a misdemeanor.**

It shall be the duty of the inspector or magistrate who inspects such hides as are mentioned in this act to keep a record of the marks, brands, color, and a general description of such hide, and for whom inspected, with the date of such inspection, and return the same to the clerk of the county court within ten days after such inspection, and shall be entitled to receive the sum of twenty-five cents for each hide so inspected, to be paid by the party having the hide inspected; and any inspector or magistrate who shall fail to keep such record, or shall fail to make such report to the county clerk as provided in this act, shall be deemed guilty of a misdemeanor, and on conviction may be fined in any sum not less than five nor more than twenty dollars for each hide that he shall fail to inspect or report as provided in this act.

**§ 9. Counties exempted from this regulation.**

The provisions of this act shall in no wise apply to either of the following counties: Bell, Gonzales, Coryell, Hamilton, Mills, Brown, Comanche, Lavaca, Llano, San Saba, McCulloch, Concho, Runnels, Coleman, Travis, Grayson, Cooke, Montague, Colorado, Bexar, Jasper, Newton, Orange, Jefferson, Polk, San Jacinto, Tyler, Chambers, Hardin, Liberty, Harrison, Smith, Upshur, Gregg, Wood, Rains, Bowie, Cass, Morris, Titus, Lee, Bastrop, Fayette, Hill, Johnson, Ellis, McLennan, Falls, Robertson, Milam, Brazos, Galveston, Brazoria, Matagorda, Guadalupe, Caldwell, Hays, Blanco, Comal, Tarrant, Wise, Parker, Jack, Dallas, Nacogdoches, San Augustine, Sabine, Shelby, Panola, Rusk, Hunt, Hopkins, Delta, Franklin, Camp, Angelina, Houston, Leon, Grimes, Madison, Kaufman, Rockwall, Fannin, Lamar, Red River, Van Zandt, Henderson, Cherokee, Bosque, Hood, Erath, Somervell, Collin, Denton, Trinity, Walker, Montgomery, Harris, Austin, Washington, Wharton, Fort Bend, Waller, Burleson, Limestone, and Freestone. [Act April 6, July 6; 1889; 21 Leg. p. 84.]

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## TITLE 94.—STOLEN PROPERTY.

ARTS. 4660, 4661. See Civil Statutes.

(37—Sup. Tex. Stat.)

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## TITLE 95.—TAXATION.

CH. 1.—OF THE LEVY OF TAXES AND PAYMENT OF  
OCCUPATION TAXES.

## ART.

4662. See Civil Statutes.

4662a. Direct *ad valorem* tax. *New.*

4663, 4664. See Civil Statutes.

## ART.

4665. Occupation taxes. *Amendment.*

4667 to 4668e. See Civil Statutes.

ART. 4662a. Direct *ad valorem* tax.

§1. There shall be levied and collected for the year 1888 an *ad valorem* tax of ten cents on the hundred dollars for general revenue purposes, and for every year thereafter an annual *ad valorem* tax of twenty cents on the hundred dollars, of the cash value thereof estimated in lawful currency of the United States, on all real property situated and on all movable property owned in the state on the first day of January in each and every year, and on all property sent out of the state prior to the first day of January for the purpose of avoiding the payment of taxes thereon and afterwards returned to the state, except so much thereof as may be exempted by the Constitution and laws of the state or of the United States, which cash value shall be estimated in the manner prescribed by law.

§2. Nothing in this act shall be construed as in any manner repealing or affecting the provisions of an act known as chapter 111 of the acts passed at the regular session of the Nineteenth Legislature of the State of Texas, approved March 31 1885 [Civil Statutes, Art. 4662], except so much of section one thereof as relates to the levy and collection of an annual state *ad valorem* tax for general revenue purposes. [Act. May 21, 1888; 20 Leg. S. S. p. 9.]

## ART. 4665. Occupation taxes.

That there shall be levied on and collected from every person, firm, company, or association of persons pursuing any of the following named occupations an annual occupation tax, except when herein otherwise provided, on every such occupation or separate establishment, as follows:

MERCHANTS. From every merchant whose annual purchases amount to ten hundred thousand dollars, three hundred dollars; from every merchant whose annual purchases amount to seven hundred and fifty thousand dollars, two hundred and fifty dollars; from every merchant whose annual purchases amount to five hundred thousand dollars, two hundred dollars; from every merchant whose annual purchases amount to two hundred and fifty thousand dollars, one hundred and fifty dollars; from every merchant whose annual purchases amount to one hundred thousand dollars, one

hundred and twenty five dollars; from every merchant whose annual purchases amount to fifty thousand dollars, sixty dollars; from every merchant whose annual purchases amount to twenty-five thousand dollars, twenty-five dollars; from every merchant whose annual purchases amount to fifteen thousand dollars, twenty dollars; from every merchant whose annual purchases amount to ten thousand dollars, twelve dollars; from every merchant whose annual purchases amount to five thousand dollars, six dollars; from every merchant whose annual purchases amount to two thousand dollars or less, three dollars.

**MERCHANT DEFINED.** A merchant in the meaning of this act is any person, firm, or association of persons engaged in buying and selling lumber and shingles, goods, wares, and merchandise of any kind whatever.

**PATENT MEDICINES.** From every traveling person selling patent or other medicine, one hundred and seventy-five dollars; and no traveling person shall so sell until said tax is paid; *provided*, that this tax shall not apply to commercial travelers, drummers, or salesmen making sales or soliciting trade for merchants engaged in selling drugs or medicines by wholesale.

**FORTUNE TELLER.** From every fortune teller, one thousand dollars; from every *clairvoyant* or *mesmerist* who plies his or her vocation for money, fifty dollars for each and every county in which such vocation is carried on.

**MONEY BROKERS OR BANKERS.** From every person, firm, or association of persons engaged in discounting and shaving paper, or engaged in business as money brokers or bankers, or dealers in stocks, securities, or bills of exchange, or in buying and selling bonds, state or county, warrants or other claims against the state, an annual tax of twenty-five dollars in a city or town of not more than two thousand inhabitants; in a city or town of five thousand inhabitants and not less than two thousand, an annual tax of sixty dollars; in a city or town of ten thousand and not less than five thousand inhabitants, an annual tax of one hundred and twenty dollars; in a city or town of twenty thousand and not less than ten thousand inhabitants, an annual tax of one hundred and eighty dollars; in a city or town of more than twenty thousand inhabitants, an annual tax of two hundred and forty dollars.

**PHOTOGRAPHERS.** From every operator or owner of any daguerrean, photograph, or other such like gallery, by whatever name called, if in any incorporated city or town of less than five thousand inhabitants, six dollars; if more than five thousand inhabitants, fourteen dollars; and if elsewhere, four dollars; and from every person soliciting work for any daguerrean, photograph, or such like gallery, or for persons engaged in the business of copying or enlarging pictures or photographs of any character, where such

gallery is not situated in or such business is not in the county in which he solicits such work, seven dollars.

**AUCTIONEER.** From every auctioneer doing business in a city of ten thousand inhabitants or more, an annual tax of forty dollars; from every auctioneer in a city or town of five thousand and not more than ten thousand inhabitants, twenty-five dollars; from every auctioneer in a city or town of two thousand inhabitants and not more than five thousand, ten dollars; from auctioneers in all other towns or villages, seven dollars.

**TOLL BRIDGE.** From every keeper of a toll bridge, an annual tax of seven dollars.

**SHIP BROKERS OR SHIP AGENTS.** From every person, firm or association of persons following the occupation of ship brokers or ship agents, if in a city or town of ten thousand inhabitants or more, fifty dollars; if in a city or town of less than ten thousand inhabitants, ten dollars.

**SALES ON COMMISSION.** From every person, firm, or association of persons selling upon commission, an annual tax of seven dollars.

**LAND AGENT.** From every land agent there shall be collected an annual tax of five dollars. The term "land agent" shall be construed to mean any person, firm, or association of persons performing for compensation any of the following services: purchasing or selling real estate for others, purchasing or selling land certificates for others. But this term land agent shall not be so construed as to levy tax upon attorney in addition to the one hereinafter levied.

**ATTORNEYS; CONVEYANCERS.** From every person practicing law, and from every conveyancer or other person drawing deeds or other legal instruments for pay, five dollars; *provided*, that attorneys at law shall only pay county occupation tax in the county of his or their residence.

**PHYSICIAN; SPECIALIST.** From every physician, surgeon, oculist, or medical or other specialist of any kind, traveling from place to place in the practice of his profession, an annual tax of fifty dollars in each county where he may practice his profession; from every dentist, five dollars.

**SHOOTING GALLERY.** From every person or firm keeping a shooting gallery at which a fee is paid or demanded, an annual tax of twenty-five dollars in each county.

**KNIFE RACK, ETC.** From every person or firm keeping a knife, cane, or doll rack, or any other device upon which rings are pitched, or at which balls are thrown, an annual tax of one hundred dollars.

**BILLIARD, BAGATELLE, ETC.** From every billiard, bagatelle, pigeon-hole, devil-among-the-tailors, or jenny-lind table, and pool table, or anything of the kind, used for profit, twenty dollars; and any such table, used in connection with any drinking saloon or other place of business where intoxicating liquors, cigars, or other

things of value are sold or given away, or upon which any money or any other thing of value is paid, shall be regarded as used for profit.

**IMMORAL NEWSPAPERS.** From every person, firm, or association of persons selling or offering for sale the Illustrated Police News, Police Gazette, Sporting World, or other illustrated publications of like character, the sum of five hundred dollars in each county in which sale may be made or offered to be made.

**POOL SELLER.** From any person or persons who shall sell pools on horse races or other contests, five dollars for each and every day they may so sell said pools.

**TEN-PIN ALLEYS, ETC.** For every nine or ten-pin alley, or any other alley used for profit by whatever name called, constructed or operated upon the principle of a bowling alley, and upon which balls, rings, or other devices used as substitutes thereof are rolled, without regard to the number of pins used, or whether pins are used or not, or whether the balls, rings, or other devices are rolled by hand or with a cue or any other device, one thousand dollars. Any such alley used in connection with any drinking saloon or any drug store, or with any drug store where intoxicating liquors are sold or given away, or upon which any money or thing of value is paid, shall be regarded as used for profit.

**HOBBY HORSE, ETC.** From all persons keeping or using for profit any hobby horse or flying jenny, or device of that character with or without name, sixteen dollars for each county wherein the same are kept or used.

**PEDDLER.** From every foot peddler, five dollars in each county in which he peddles; for every peddler with one horse or one pair of oxen, the sum of fifteen dollars in each county where he peddles; for every peddler with two horses or two pairs of oxen, thirty dollars in each county in which he may pursue such occupation; for every peddler with sail or other boat, in the streams or along the coast or bay of this state, thirty dollars in each county in which he may pursue such occupation; *provided*, any blind, deaf and dumb, or any wounded person who has lost a hand or a foot, shall not be required to pay any tax for peddling; *provided*, such person shall not be exempt from such peddler's tax if in the employ of another person or persons; nothing herein contained shall be so construed as to include traveling vendors of tin or earthenware; *provided further*, that nothing herein contained shall be so construed as to include traveling vendors of literature, exclusively religious in character, or traveling vendors of vegetable, poultry, or other country produce exclusively, fruit and fruit trees exclusively.

**THEATER, ETC.** For every theater or dramatic representation from which pay for admission is demanded or received, two dollars for each day they may perform, or fifty dollars per quarter; *pro-*

*vided*, that theatrical or dramatic representations given by performers for instruction only or entirely for charitable purposes shall not be herein included.

**CIRCUS, ETC.** For every circus where equestrian or acrobatic feats and performances are exhibited for which pay for admission is demanded or received, for each performance thereof, fifty dollars, notwithstanding more than one such performance may take place daily; for every exhibition where acrobatic feats are performed for profit not connected with the circus, ten dollars for each performance.

**SLEIGHT OF HAND.** For every sleight-of-hand performance or exhibition of legerdemain, ten dollars.

**FIGHTS.** For every fight between man and man, or between men and bulls, or between dogs and bulls, or between bears and dogs, or between bulls and any other animals, or between dogs and dogs, five hundred dollars for each performance.

**COCK PIT.** For every cock pit, when kept for profit or upon which any money or thing of value is bet or paid, twenty-five dollars.

**MENAGERIE, ETC.** For every menagerie, wax work, or exhibition of any kind where a separate fee for admission is demanded or received, ten dollars for every day on which fees for such admission are received; *provided*, that exhibitions by associations organized for promotion of art, science, charity or benevolence shall be exempt from taxation; *provided*, that persons who form a museum composed entirely of the products of Texas shall have the right to exhibit same for a fee without paying any occupation tax.

**CONCERT.** For every concert where a fee for admission is demanded or received, two dollars; *provided*, that entertainments when given by the citizens for charitable purposes or for the support or aid of literary or cemetery associations are exempt.

**LIVERY STABLE, ETC.** For every livery or feed stable, thirty cents for each stall and thirty cents for each hack, buggy, or other vehicle; for every hack, buggy, or other vehicle let for hire, not connected with a livery, feed, or sale stable, two dollars; for every wagon yard used for profit, not connected with a livery stable, five dollars.

**INSURANCE.** From every life insurance company doing business in this state, an annual tax of three hundred dollars, and in every county in which they may do business, ten dollars as county tax; from every fire, marine, health, live-stock, guarantee, or accident insurance company doing business in this state, an annual tax of two hundred dollars, and in every county in which they may do business, seven dollars as county tax. The state tax due from insurance companies shall be paid by such companies to the comptroller of public accounts, whose receipts, under seal, shall be ev-

idence of payment of state tax, and the county collector's receipt shall be authority to work in any county of this state for which such company has a receipt.

**LIGHTNING RODS.** From every person, firm, or association or [of] persons dealing in lightning rods, an annual tax of thirty-six dollars to the state and eighteen dollars as county tax to the county in which such business is carried on; upon every person canvassing for the sale of lightning rods, an annual tax of one hundred dollars and fifty dollars as county tax in each county in which such canvassing is done.

**BROKER; FACTOR; COMMISSION MERCHANT.** From every person, firm, or association of persons following the occupation of cotton broker, cotton factor, or commission merchant, in a city of more than five thousand inhabitants, an annual tax of thirty-five dollars, and in all other cases an annual tax of eighteen dollars; *provided*, that a merchant who pays an occupation tax as under section 3 of this act, shall not be considered as a "cotton broker."

**PAWN BROKER.** From every pawn broker an annual tax of seventy-five dollars.

**COTTON OR WOOL BUYER.** From every cotton buyer and every buyer of wool, ten dollars; *provided*, that a merchant who pays an occupation tax as herein prescribed shall not be considered a cotton buyer or buyer of wool.

**SEWING MACHINES.** From every person, firm, agency, or association of persons dealing in sewing machines, an annual tax of fifteen dollars to the state and seven dollars as county tax in every county where such business may be carried on; *provided*, that a merchant who pays an occupation tax as required by this section shall not be required to pay this special tax to sell sewing machines.

**PEDDLER OF CLOCKS OR STOVES.** From every person or firm who peddles out clocks or cooking stoves or ranges over the county, two hundred and fifty dollars for the state and one hundred dollars for each county in which they make a sale; *provided*, that a merchant who pays an occupation tax as required by this section, shall not be required to pay this special tax for selling clocks and cooking ranges or stoves.

**EXPRESS BUSINESS.** From any person, firm, or association of persons doing an express business in this state, an annual tax of one thousand dollars shall be levied and collected, this tax to be paid by such person, firm, or association of persons doing an express business, to the comptroller of public accounts, whose receipt under seal shall be issued to the company or companies, certified copies of which shall be evidence of the payment of the state, county, and municipal occupation tax; *provided*, that said express companies may be allowed to sell money orders without paying an

additional tax, but said express companies shall not be allowed to charge a greater per cent. as commissions than post-office money orders can be bought for; *provided further*, that they shall not be required to sell any order for less than five (5) cents as a commission.

**SLEEPING CARS, ETC.** From every person, firm, or association of persons owning or running any palace, sleeping, or dining-room cars on any railroad in this state, there shall be collected an annual tax of fifty cents per mile for each and every mile of any and all railroads in this state over which such cars may run. The tax herein due shall be paid by such person, firm, or association of persons to the comptroller of public accounts, whose receipt under seal shall be issued to the person, company, or firm, certified copies of which shall be evidence of the payment of state tax; *provided*, that nothing herein contained shall authorize the levy of any county or municipal tax upon such person, firm, or association of persons.

**RAILROAD CARS; STEAMBOATS OR STAGE COACHES.** From every person, firm, or association of persons owning or running any railroad cars, steamboat, or stage coaches in this state, there shall be collected quarterly, on the first day of January, April, July, and October of each year, a tax of one per cent. on steamboats and stage coaches and one per cent. on railroads upon their gross receipts from all their passenger travel within this state. The said gross receipts to be returned under oath by said owner, agent, or manager, to the comptroller, and said tax to be collected by the comptroller under such regulations as he may prescribe; *provided*, that nothing herein contained shall authorize the levy of any county or municipal tax upon such person, firm, or association of persons.

**TELEGRAPH COMPANY.** From every chartered telegraphic company doing business in this state, there shall be collected one cent for every full rate message, sent by any person within this state to any person within this state, and one-half that for any message less than a full rate message so sent. This tax to be paid quarterly to the comptroller, on the sworn statement of the chief manager of said company or companies, or any other officer authorized by said company to make said statement, who shall keep a record of such messages; and the receipts of the comptroller, under seal, shall be issued to said company or companies, certified copies of which shall be evidence of the payment of the state tax; *provided*, railroad messages for running their trains and for company use shall not be taxed; *provided further*, that nothing herein contained shall authorize the levy or collection of any county or municipal tax upon such chartered companies for messages sent and messages sent on official business by officers of the United States.

**TELEPHONE COMPANY.** For each telephone company doing business in this state, an annual state tax of fifty dollars and five dollars to each county through which their lines may run.

**GAS COMPANY.** From each gas company manufacturing gas in towns and cities of ten thousand or more inhabitants, thirty-five dollars; in towns and cities having less than ten thousand inhabitants, twenty dollars.

**ELECTRIC LIGHT COMPANY.** From each electric light company operating an electric light in a town or city of ten thousand inhabitants or more, thirty-five dollars annually; and in a town or city of less than ten thousand inhabitants, an annual tax of twenty dollars.

**LOAN AGENTS.** From every person, firm, or association of persons loaning money as agent or agents for any corporation, firm, or association, either in this state or out of it, an annual occupation tax of one hundred dollars for the state for the principal office and a county tax of ten dollars from each agent for each county in which he may do business, and no additional occupation tax shall be levied by any county, city, or town in the state.

**REPORTERS OF COMMERCIAL CREDIT.** From each and every person, party, partnership, or corporation engaged in the business of inquiring into and reporting upon the credit or standing of persons engaged in business in this state, or acting as agent or business manager in this state for any such person, party, partnerships, or corporation, two hundred and fifty dollars; *and provided further*, that no county, city, or town shall levy or collect any occupation tax upon or from any such person, party, partnership, joint-stock association, or corporation. The payment of this tax, evidenced by the receipt of the comptroller of public accounts, shall exempt the company or party paying the same from the payment of this tax in any other county; and payment of such tax shall not be required of any sub-agent or correspondent of the party or company carrying on such business in this state.

**SKATING RINK.** From each skating rink, twenty-five dollars.

**OCCUPATION TAX RECEIPTS.** When the comptroller furnishes collectors with blank occupation tax receipts, he shall furnish the commissioners' courts with the numbers and value of the receipts furnished to their respective collectors, and such courts shall charge their respective collectors with the number and such proportion of the value of the receipt so furnished as shall apply to the county tax when such collectors shall make their settlements with the comptroller. The comptroller shall furnish the commissioners' courts with the numbers and value of the receipts used, and with the numbers and value of the receipts returned, and with the amount of the occupation taxes collected by their respective collectors. [April 6; July 6, 1889; 21 Leg. p. 24.]



## CH. 2.—OF THE PROPERTY SUBJECT TO TAXATION AND THE MODE OF RENDERING THE SAME.

## ART.

4669 to 4672. See Civil Statutes.

4673. Exemptions from taxation. *Annotated.*4674a. Personal property temporarily removed from state shall be assessed. *New.*

4675. See Civil Statutes.

4676. Where to be rendered. *Annotated.*4676a. Assessment of live-stock in pastures. *Amendment.*

## ART.

4676a, §1. See Civil Statutes.

§2. Lands on which taxes have been paid not afterwards taxed. *Annotated.*

4677 to 4683. See Civil Statutes.

4684. Rendition by banker, broker, etc. *Annotated.*

4685 to 4690. See Civil Statutes.

4691. Leasehold interest in public lands. *Annotated.*

4692. See Civil Statutes.

## ART. 4673. Exemptions from taxation.

(5.) Special taxes for local benefit levied by a city do not come within the meaning of the term "taxation," as usually employed in the Constitution.

The power of a city to levy and collect taxes, when claimed against the county as owner, and against the county property as a lien, does not extend to property owned by the county and used by it for the county court-house. *County of Harris v. Boyd*, 70 T. 237.

## ART. 4674a. Personal property temporarily removed from state shall be assessed.

It shall be the duty of the assessor of taxes to list on his rolls for taxation all property temporarily removed from the state on or before the first day of January of each year, and all property removed from the state for the purpose of evading taxation prior to January first of each year shall be liable to taxation at any time after the same shall have been returned to the state before the assessor has completed his rolls, and all notes or bonds executed for money loaned in the state and sent out of the state before the first of January shall be subject to assessment for each of the years during which the notes and bonds remain unpaid; *provided*, that said property so returned and brought into the state after the first day of January shall not be the proceeds of any moneys or property already assessed for said year. [Act May 15, 1888; 20 Leg. S. S. p. 3.]

## ART. 4676. Where to be rendered.

(1.) Personal property, belonging either to a corporation or a natural person, must be assessed and the taxes thereon paid in the county where it is situated, unless such county has not been organized, in which event the assessment must be made and the taxes collected in the county to which it is attached for judicial purposes. *Cattle Company v. Faught*, 69 T. 402.

## ART. 4676a. Assessment of live-stock in pastures.

All persons, companies, and corporations owning pastures in this state which lie on county boundaries shall be required to list for assessment all live-stock of every kind owned by them in said pastures in the several counties in which such pastures are situated, listing in each county such portion of said stock as the land in such county is of the whole pasture. All persons, companies, and corporations owning any kind of live-stock in pastures not their own

shall list said live-stock in the several counties in which such pastures are situated in the same manner; and in both cases the tax upon such live-stock shall be paid to the tax collectors of the several counties in which such live-stock is listed and assessed. [Amendment February 13, 1889; 21 Leg. p. 29.]

**ART. 4676a, §2. Lands on which taxes have been paid not afterwards taxed.**

(1.) Chisholm and others reside in Rockwall county, and asked an injunction against Adams, the tax assessor of Kaufman county, restraining him from assessing the property within a strip 2500 varas wide claimed by both counties. The injunction was refused. Such ruling approved, (1) because claimants had a clear legal remedy at law in appealing to the county commissioners' court, without whose approval no liability is fixed by the assessment. (2) It does not appear that injury to complainants would result; the statutes (Art. 4710a, §1), require that the commissioner of the land office furnish to each assessor a list of lands in his county, which lands are required to be assessed, and the act of April 23d, 1879, (Art. 4676a, §2), provides against double taxation in cases of mistakes or disputes as to county lines. (3) The acts of the assessor of themselves would not cast a cloud upon the lands; and (4) no act is shown which would render it necessary to resort to any court or other tribunal for the protection of any legal right or avoidance of any threatened injury.

A threatened prosecution against land owners within such disputed territory for failure to render property for taxation affords no grounds for injunction restraining the assessor of one of the counties from making an assessment of lands in such disputed tract. *Chisholm v. Adams*, 71 T. 678.

**ART. 4684. Rendition by banker, broker, etc.**

(1.) All the property, both real and personal, of a bank chartered under the laws of Texas is subject to taxation. To tax the shares of such a bank, which are but evidence of an interest in property already taxed, would be in effect to impose a double taxation.

The fact that the bank fails to render its property for taxation will not authorize an assessor to list for taxation its shares of stock. *Gillespie v. Gaston & Thomas*, 67 T. 599.

**ART. 4691. Leasehold interest in public lands.**

(2.) The general rule is that the owner of real estate leased is taxed upon the entire value of the property. This satisfies the constitutional requirement that all property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value.

It would seem where the leasehold is taxed that its value should be deducted from the taxable interest of the owner, otherwise double taxation would be imposed, not to be presumed when the law can be otherwise construed.

By article 4691, Revised Statutes, leasehold estates are made taxable, and the valuation is provided for in article 4692, to be the value of the leasehold estate.

Section 9, article 11, and section 6, article 7, of the Constitution, exempt from taxation lands held by counties for public free school purposes, and such exemption limits the power of the Legislature.

The Constitution forbidding the taxation of the lands it forbids the taxation of an estate therein less than the fee, whether imposed upon the county or its lessee.

County school lands are not subject to taxation while owned by counties, whether the lands be leased or not. *Daughtery v. Thompson*, 71 T. 192.

### CH. 3.—OF THE ASSESSMENT OF TAXES.—ELECTION AND QUALIFICATION OF THE ASSESSOR.

**ART.**

4693 to 4710a. See Civil Statutes.

4711. Assessment of property non-rendered. *Annotated.***ART.**

4712 to 4728. See Civil Statutes.

**ART. 4711. Assessment of property non-rendered.**

(2.) The failure of an assessor in listing property for taxation to give the survey number of the grant as required by this article, renders subsequent proceedings to enforce collection of the tax illegal, unless good cause can be shown why the requirement of the statute in this regard was not complied with.

It would be a sufficient description when an entire survey is assessed to give the owner's name if known, or to state that it is unknown, together with the abstract number, certificate number, survey number, name of original grantee and number of acres, but when only a portion of a survey is assessed some further description is necessary in order to identify the particular portion assessed. *Morgan v. Smith et al.*, 70 T. 637.

### CH. 3a.—ASSESSMENT AND COLLECTION OF TAXES IN UNORGANIZED COUNTIES.

**ART. 4728a.** See Civil Statutes.

### CH. 4.—OF THE COLLECTION OF TAXES.—ELECTION AND QUALIFICATION OF THE COLLECTOR.

**ART.**

4729, 4730. See Civil Statutes.

4731. Sheriff a collector, when. *Annotated.*4732. Bond and oath. *Annotated.*

4733 to 4741. See Civil Statutes.

4742. Quarterly reports. *Amendment.*4743. Examination of reports by commissioners' court. *Amendment.*4743a. Report shall be disapproved, when. *New.*

4744 to 4748. See Civil Statutes.

4748a. Property subject to lien for taxes; payment enforced. *New.***ART.**4748b. Suit brought for taxes on un-rendered personal property. *New.*

4749 to 4755. See Civil Statutes.

4756. The tax deed and its requisites. *Annotated.*

4757 to 4759a. See Civil Statutes.

4759b. Time for redemption of lands sold to the state for taxes extended. *New.*4759c. Tax title to land erroneously assessed released by the state. *New.*

4760 to 4769a. See Civil Statutes.

**ART. 4731. Sheriff a collector, when.**

(2.) In a suit by a county against a sheriff who was *ex-officio* collector of the county, to recover taxes alleged to have been collected by him and not paid over, reports of taxes collected, indorsed by his deputy in his name as sheriff and collector, when produced from the proper custody, and attached as exhibits to the petition, are admissible in evidence, though not sworn to. *Webb county v. Gonzales*, 69 T. 455.

(3.) In a suit against a tax collector a county ledger is not admissible in evidence against the defendant.

Neither the sheriff, as tax collector, nor his securities can set up the fact that no legal levy of taxes was made, in an action against them for not paying over, when it is shown that the taxes were collected by the officer and were not paid over, following *Morris v. The State*, 47 T. 583, and other cases cited.

Evidence for the defendant that the money paid as taxes was received by the collector from non-residents of a county attached for judicial purposes to the county of that officer, is not admissible. The presumption would obtain that money so collected was paid on legal assessments on personal property.

The bond of a tax collector, with the approval thereof required by law, is the best evidence of the time when the officer qualified as such. *Webb county v. Gonzales*, 69 T. 455.

**ART. 4732. Bond and oath.**

(4.) A petition against a delinquent tax collector and the sureties on his bond is sufficient if it alleges that the sum claimed was actually collected as taxes, and that he collected the money by virtue of his office.

The collector of taxes is required by law to make a quarterly report of occupation taxes collected for the state and county, to be filed with the county clerk. Such reports made and filed, whether signed or not by the collector, are admissible against him and his sureties as admissions made in course of official business, as well as reports by law required.

In absence of any statute requiring such reports, *held* that quarterly reports of other taxes collected, made by the collector, are evidence against him and his sureties, and un rebutted sufficient to establish their liability. *Mast v. Nacogdoches County*, 71 T. 380.

**ART. 4742. Quarterly reports.**

At the end of each quarter the collector of taxes shall, on forms to be furnished him by the comptroller of public accounts, make a report under oath to the comptroller of all taxes collected by him for the state after three months. The first report shall include the months of October, November, and December; the second shall include the months of January, February, and March; the third shall include the months of April, May, and June; and the fourth shall include the months of July, August and September, of each year; and he shall make like reports to the commissioners' court of all taxes collected for the county. He shall file such reports, together with the tax receipt stubs and a true copy of his report to the comptroller, in the office of the county clerk. At the time of filing such reports the collector of taxes shall pay any balance in his hands due the county to the county treasurer, and remit any balance due the state to the state treasurer. The county clerk shall, within five days, examine the said reports and stubs, and if the reports and stubs agree in every particular as regards names, dates, and amounts, he, the clerk, shall certify to their correctness; but if they do not agree in any particular, he shall so certify. He, the clerk, shall then forward the report intended for the comptroller, with his certificate thereon, to such officer, and file the true copy thereof with the tax receipt stubs and the report intended for the commissioners' court in his office. [Amendment April 3, 1889; 21 Leg. p. 30.]

**ART. 4743. Examination of reports by commissioners' court.**

It shall be the duty of the commissioners' court, at its next regular session after the filing of any report provided for in the foregoing article, to examine such reports and compare the same with the tax rolls and tax receipt stubs and with the receipts and vouch-

ers accompanying the same, and the collector of taxes shall appear before said commissioners' court at such regular terms, and make a full statement of all taxes and money, both of the county and state, collected by him during the three months covered by such report. If any mistake is discovered in any such report, the commissioners' court shall correct the same. If the collector of taxes is found to be still due the state or county for taxes collected during such quarter, he shall immediately pay to the county treasurer the amount due the county, and file a proper receipt therefor with the county clerk, and remit to the state treasurer the amount due the state, and file with such clerk a voucher showing that he has done so. When such reports are found to be correct, and the tax collector has paid to the county and state treasurer the full amount due the state and county respectively, the commissioners' court shall enter an order approving said reports, with the order approving the same shall be recorded in the minutes as other proceedings of said court. [Amendment April 3, 1889; 21 Leg. p. 30.]

**ART. 4743a. Reports shall be disapproved, etc., when.**

If any collector of taxes shall have failed to pay over to the county treasurer the amount due by him to the county, or remit to the state treasurer the amount due the state, before the next term of the commissioners' court after the filing of the reports as provided in the foregoing article, or shall, during such term, fail or refuse to pay or remit the same and file proper vouchers therefor as provided in said article, the commissioners' court shall not approve his reports, but such court shall ascertain the amount due by him both to the county and state, and enter an order requiring him to pay the same to the proper treasurer, as is provided in article 4769a, section 2, of the Revised Statutes, and notify such collector to account as is provided for in article 4769a, section 3. [Additional Article, April 3, 1889; 21 Leg. p. 31.]

**ART. 4748a. Property subject to lien for taxes; payment enforced, how.**

In all cases where a taxpayer makes an assignment of his property for the payment of his debts, or where his property is levied upon by creditors, by writs of attachment or otherwise, or where the estate of a decedent is or becomes insolvent and the taxes assessed against such person or party or against any of his estate remain unpaid in part or in whole, the amount of such unpaid taxes shall be a first lien on all such property; *provided*, that when taxes are due by an estate of a deceased person the lien herein provided for shall be subject to the allowances to widows and minors, funeral expenses, and expenses of last sickness; and such unpaid taxes shall be paid by the assignee, when said property has been assigned, by the sheriff out of the proceeds of sales, in case such property has been seized under attachment, or other writ, and by

the administrator or other legal representative of decedents, and if said taxes shall not be paid all said property may be levied on by the tax collector and sold for such taxes, in whomsoever's hands it may be found. [Act May 14; August 14, 1888; 20 Leg. S. S. p. 4.]

**ART. 4748b. Suit brought for taxes on unrendered personal property.**

Hereafter it shall be the duty of the district or county attorney of the respective counties of this state, by order of the commissioners' court, to institute suit in the name of the state for the recovery of all money due the state and county as taxes due and unpaid on unrendered personal property; and in all suits where judgments are obtained under this act the person owning the property on which there are taxes due the state and county shall be liable for all costs; *provided*, such suits may be brought for all taxes so due and unpaid for which such delinquent taxpayer may be in arrears for and since the year 1886; *and provided further*, the state and county shall be exempt from liability for any costs growing out of such action; *provided*, all suits brought under this act for the recovery of taxes due on personal property shall be brought against the person or persons who owned the property at the time such property should have been listed or assessed for taxation; *provided*, that no suit shall be brought until after demand is made by the collector in person for the taxes due; *and provided further*, that no suit shall be brought for an amount less than twenty-five dollars. [Act May 17; August 14, 1888; 20 Leg. S. S. p. 8.]

**ART. 4756. The tax deed and its requisites.**

(4.) In a suit involving the validity of a tax title the assessment rolls showing the assessment of the land are not admissible without evidence that the abstract number of the survey was correctly given, it being necessary to a legal assessment.

A legal assessment, advertisement and tax sale of land, must be clearly shown before any rights can be acquired under a tax title. *Railway v. Poindexter*, 70 T. 98.

Even after the lapse of forty years, no presumption will be indulged that the laws regulating the assessment and sale of land for taxes have been complied with so as to supply the missing evidence of power in the officer to make the sale.

One claiming land under a tax sale made under the act of 1840 [Early Laws, Art. 711], must aver and prove compliance on the part of the officer who executed the deed with all the essential requisites of the law, for a valid tax sale. *Telfener v. Dillard*, 70 T. 139.

Ordinarily it is requisite to the validity of a tax sale that the property sold shall have been described when listed for taxation by the number of the certificate under which it was surveyed. *Henderson v. White*, 69 T. 103; *McCormick v. Edwards*, 69 T. 106.

(5.) Our courts have determined that from the tax deed no presumption is drawn that the requisite proceedings upon which the power to sell arises have been taken. *Dawson v. Ward*, 71 T. 72.

The petition alleged the existence of a void tax sale and that it was a cloud upon plaintiff's title. On the trial a tax deed for the land was produced and there was no testimony to any fact upon which the legality of the tax sale could

be based; *held*, that it did not devolve upon the plaintiff to further show the invalidity of the tax deed. It being void no testimony was required to authorize the court to treat it as invalid. *Dawson v. Ward*, 71 T. 72.

A tax deed was attacked upon the following, among other, grounds: 1. The tax rolls fail to show the number of the certificate by virtue of which the land was located. 2. The notice of sale fails to show when the land would be sold. 3. The deed made by the collector describes the land sold for taxes as being one hundred and sixty acres, patented to Jeremiah Heath, assignee of Benjamin F. Berry, describing it by metes and bounds, and excepting out of said tract eighty acres on which the taxes were paid by H. F. Heath. These objections are well taken. *Henderson v. White*, 69 T. 103.

(9.) A conveyance by a tax collector or sheriff of a number of acres to be taken out of a larger survey is void for uncertainty. *Morgan v. Smith et al.* 70 T. 637.

(12.) A deed purporting to convey land which describes it only by quantity, and as being part of a larger tract, with nothing whereby to identify what specific portion of the larger tract is intended to be conveyed, is void for uncertainty of description in a tax title. *Lumber Co. v. Hancock*, 70 T. 312.

**ART. 4759b. Time for redemption of lands sold to the state for taxes extended.**

All lands which have been heretofore sold for taxes and bought in by the state, or by cities or towns, and which have not been redeemed, may be redeemed by the owner thereof, or their agent or legal representative, if within twelve months from the date on which this act takes effect said owner or agent or legal representative shall pay to the state the original state and county taxes for which said lands were sold, and all costs, together with eight per cent. interest thereon, and the taxes due each year since such sale, or from the day of the accrual of such subsequent taxes, as the case may be, under such rules and regulations as shall be prescribed by the comptroller of the state. [Act March 7, 1889; 21 Leg. p. 138.]

**ART. 4759c. Tax title to land erroneously assessed released by the state.**

*Whereas*, many deeds to land are imperfect in that they do not give the abstract numbers or the original headright surveys correctly; and, *whereas*, many real estate owners have heretofore rendered and paid taxes upon their lands in this state under an incorrect abstract number or headright survey, or as unknown, the result of the said erroneous rendition of lands for taxes being that in many instances the true headright surveys have been sold to the state for taxes, when in fact the taxes due on said lands had previous to such tax sale been paid in full by the owners thereof; therefore,

§1. *Be it enacted, etc.*, That article 4759, chapter 4, title 95, of the Revised Civil Statutes of the State of Texas, be amended by adding thereto a new article, to be styled article 4759d, to read as follows, to-wit:

**ART. 4759d.** The commissioners' courts of the several counties in this state shall at the regular terms of said courts sit as a court of inquiry in cases where land has been erroneously rendered for

taxes; and any land owner whose land has been or may be sold to the state for taxes, may appear before said court in person or by proxy and show to the satisfaction of a majority of said court that the taxes for which his or her lands has been sold have been paid, although the same was rendered in an incorrect abstract number or survey or original grantee; thereupon said commissioners' court shall issue to the said land owner a certificate setting forth fully said facts, which certificate shall be signed officially by the county judge of said county; and upon the presentation of said certificate to the comptroller of public accounts he shall execute and deliver to said land owner a valid deed relinquishing all the right, title, and interest the state may have acquired in and to said land by reason of such tax sale. [Additional Article, February 23, 1889; 21 Leg. p. 31.]

## CH. 5.—OF THE ASSESSMENT AND COLLECTION OF BACK TAXES ON UNRENDERED LANDS.

## ART.

4770 to 4777b, §15. See Civil Statutes.  
4777b, §16. Limitation not a defense  
against payment of taxes.  
*Annotated.*

## ART.

4777b, §17 to 4777d. See Civil Statutes.

### ART. 4777b, §16. Limitation not a defense against payment of taxes.

(1.) The general statutes of limitation do not exempt municipal corporations from their operation, and the courts have no power to do so upon the mere ground of expediency and to avoid a seeming hardship.

[*Galveston v. Menard*, 23 T. 408; *Houston & Texas Central Railway Company v. Travis County*, 4 Texas Law Review, 22; *City of Wheeling v. Campbell*, 12 West Virginia, 44; *Evans v. Erie county*, 66 Pennsylvania State, 228; *School Directors v. Georges*, 50 Mo. 194, cited, and *City of Jefferson v. Whipple*, 71 Mo. 521, reviewed.]

In construing this section of the act which denies to any taxpayer the right to plead in any court, or in any manner to rely upon any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state or to any county, city or town: *held*,

1. One who purchases property incumbered with a lien for unpaid taxes must be deemed as to such taxes a delinquent taxpayer, and cannot avail himself of a defense which his vendor could not plead had he continued to be the owner.

2. The statute contains nothing to indicate the legislative intent to give it a retroactive effect, and is operative only against those delinquent taxpayers in whose favor limitation had not run before its passage.

3. Rights based on contract are as fully protected by section 16, article 1, of the Constitution of Texas, as they are by section 10, article 1, of the Constitution of the United States. Under the former, no citizen's rights of any character can be affected by a retroactive law. The latter, it has been held, does not prohibit the passage of a retroactive law, even though such a law may divest antecedent vested rights of property, unless such rights be founded on contract.

4. That clause of the state Constitution which provides that no retroactive law shall be made, was intended to impose a broader restriction on legislative power than could exist in its absence. It protects the citizen in every legal right existing before the enactment of any law designed to retroact and deprive him of it; and this whether the right be strictly speaking a right to property or not.

5. A right in a legal sense exists when in consequence of given facts the law declares that one person is entitled to enforce against another a claim, or to resist



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the enforcement of a claim urged by another.

6. When by virtue of law a defendant may plead and show an existing state of facts which would defeat the plaintiff's right to recover, then a protecting right against the plaintiff's demand exists; such a right is fixed and vested, and in view of the constitutional provision against retroactive law, cannot be divested by legislation. The same constitutional provision protects a plaintiff in the enforcement of every right, recognized and fixed by law, against retroactive legislation.

7. Prior to this act limitation would run against the right of a municipal government to enforce the collection of taxes, and if the bar was complete in favor of the delinquent taxpayer before the adoption of this act, the right to rely on limitation as a defense was an existing right, which could not be defeated by any retroactive force of the act. *Mellinger v. City of Houston*, 68 T. 37.

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**CH. 5a.—OF THE SALE OF REAL ESTATE BID OFF TO  
THE STATE BY TAX COLLECTORS.**

**ART. 4777e.** See Civil Statutes.

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**CH. 6.—OF MUNICIPAL TAXES TO PAY SUBSIDIES IN  
AID OF RAILROAD AND OTHER INTERNAL  
IMPROVEMENTS.**

**ARTS. 4778 to 4783.** See Civil Statutes.

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**TITLE 95a.—TIMBER AND LUMBER, PROTECTION OF.**

**ARTS. 4783a.** See Civil Statutes.

## TITLE 96.—TRESPASS TO TRY TITLE.

## CH. 1.—THE PLEADINGS AND PRACTICE.

## ART.

4784. See Civil Statutes.

4785. Rules in other cases observed, how far. *Annotated.*4786. The petition shall state what. *Annotated.*

4787. See Civil Statutes.

4788. Warrantor, etc., may be made party. *Annotated.*

4789. See Civil Statutes.

4790. The possessor shall be defendant. *Annotated.*4791. May join as defendants, whom. *Annotated.*

4792. See Civil Statutes.

## ART.

4793. What proof may be made under such plea. *Annotated.*

4794 to 4799. See Civil Statutes.

4800. Surveyor appointed. *Annotated.*

4801. See Civil Statutes.

4802. Common source of title, proof of. *Annotated.*

4803 to 4806. See Civil Statutes.

4807. May recover a part, etc., when. *Annotated.*4808. The judgment, etc. *Annotated.*4809. Damages, etc., when recovered. *Annotated.*

4810 to 4812. See Civil Statutes.

## ART. 4785. Rules in other cases observed, how far.

(2.) The doctrine that proof of possession of land is alone sufficient to entitle the occupant to maintain an action of trespass against a wrongdoer, is founded on the fact that possession is *prima facie* evidence of title. But if the title be in another, the right of the possessor to recover is limited to the amount of damage to the possessory interest; if the damage be beyond this, and to the freehold, the possessor or tenant at sufferance cannot maintain an action for its recovery. *I. & G. N. Ry. Co. v. Ragsdale*, 67 T. 24.

(4.) A defendant in an action of trespass to try title, and who pleaded not guilty, is not estopped to prove title in himself by reason of having compelled one in adverse possession to attorn to him. Said tenant himself holding under a tenant placed in possession of the land by the plaintiff, the defendant having had possession prior to the plaintiff placing a tenant in the possession. *Maverick v. Flores*, 71 T. 110.

(7.) In boundary suits, the petition should set out the land in dispute by metes and bounds, as otherwise the verdict should describe the land found by the jury. *Edwards v. Smith*, 71 T. 156.

(8.) In trespass to try title the plaintiff may introduce in evidence a deed forming a link in his chain of title, though it bears date subsequent to the alleged entry as charged in the petition, if executed before the institution of the suit. *Jenkins v. Adams*, 71 T. 1.

(10.) In an action of trespass to try title possession alone is sufficient evidence in behalf of plaintiff to entitle him to recover against a mere trespasser.

[*Alexander v. Gilliam*, 39 T. 228, followed and approved.] *Parker v. Railway*, 71 T. 132.

(14.) A naked trespasser in possession may set up in his defense an outstanding title acquired by a third party by limitation to defeat an action instituted by one whose title was lost by limitation. Privity of claim or of possession is important only when it becomes necessary to tack the possession of two or more to give adverse possession for the period requisite to perfect limitation. *Branch v. Baker*, 70 T. 180.

(15.) A mortgagor, notwithstanding the terms of the conveyance, remains the real owner of the fee, and being entitled to the possession of land mortgaged, after as well as before breach of condition of defeasance, the mortgage cannot be pleaded as an outstanding title. [*Johnson v. Byler*, 45 T. 509; *Burgess v. Millican*, 50 T. 401; *Duty v. Graham*, 12 T. 434; *Mann v. Falcon*, 25 T. 275; *Morrow v. Morgan*, 48 T. 308; *Peters v. Clements*, 46 T. 115; *Wright v. Wooters*, 46 T. 380; *Sample v. Irwin*, 45 T. 567; *Moreland v. Barnhart*, 44 T. 283.] *Williams v. Wright*, 1 U. C. 711.

In trespass to try title, when the plaintiff exhibits a title derived through mesne conveyance and a voidable judicial sale, the defendant cannot prevent a recovery by showing an outstanding equity with which he has no connection.

A defendant who shows no title in himself cannot defeat a recovery by plaintiff in trespass to try title who exhibits a title *prima facie* good, by showing fraud in the procurement of one of the mesne conveyances through which plaintiff claims, with which defendant has no connection, and in which he discloses no interest. *Capt v. Stubbs*, 68 T. 222.

(16.) In an action of trespass to try title it was insisted that the court erred in refusing to permit defendant to prove that there were other joint owners to the land beside the plaintiff. The petition alleged that plaintiff was the sole owner in fee of the land in question. Section 3, article 4786, Civil Statutes, requires that the petition shall state the interest claimed by the plaintiff in the premises; and if he claims an undivided interest, he shall state the same and the amount thereof. The plaintiff had fully complied with the statute in setting forth his title; and the court did not err in refusing to permit the defendant to prove that there were other joint owners of the land beside the plaintiff, defendant not offering to connect himself with such title; if there were other joint owners, plaintiff would have been entitled to recover their interest as against a stranger. [*Pilcher v. Kirk*, 55 T. 208, and authorities cited.] *Gaither v. Hanrick*, 69 T. 92.

The right of a tenant in common to maintain an action in trespass to try title for the recovery of the entire property against a wrongdoer, is not affected by the statute which requires the plaintiff in that form of action to state in his petition the interest which he claims in the property. *Telfener v. Dillard*, 70 T. 139.

One of several tenants in common recovering land held by a trespasser, or by one without license from any of the owners, can recover rents *pro rata* against such occupant. *Whittaker v. Allday*, 71 T. 623.

In trespass to try title, a joint owner, though he claims in his petition exclusive ownership of the land, may, though he be but a joint owner with others, recover as against a stranger, and in such a case it is not competent for the defendant to show plaintiff's joint interest to defeat the action, when defendant claims no title under the other joint owners. *Gaither v. Hanrick*, 69 T. 92.

A plaintiff in trespass to try title claimed title to an undivided one-third of a survey; and for possession of the entire tract in the event the defendant failed to show title to two-thirds of it. The verdict was for plaintiff "for one-third of the property in dispute." The judgment entry was for the plaintiff for one-third of the entire tract. The verdict was rendered under a charge which instructed the jury to find "for plaintiff one-third of the land described in the petition." *Held*, that the entire property was in dispute, and there was no error in the judgment. *Edwards v. Barwise*, 69 T. 84.

(22.) The plaintiff alleged ownership in fee of the land sued for. On the trial plaintiff offered, to support his title, a contract of sale by which possession of the land was conceded. The purchase money payable in installments—the right to rescind reserved upon the failure to pay any of the installments—and reciting that the vendor retained the legal and equitable title in the land until it should be paid for. The vendee entered into possession and paid all the installments due upon the land; *held*, (1) "That such title was admissible under the allegation of ownership in fee, etc.; (2) that such title was sufficient to recover against one not showing a better title." *Land Co. v. Wood*, 71 T. 460.

(33.) In trespass to try title the appellee cannot, by filing cross-assignments of error questioning the admissibility in evidence of papers admitted in appellant's chain of title, obtain an affirmance of the judgment. Had such objections been sustained by the trial judge, the appellant might have obviated the defect, or by taking a non-suit, cured it on another trial. *Udell v. Peak*, 70 T. 547.

#### ART. 4786. The petition shall state what.

(1.) The plaintiff in trespass to try title may so frame his petition as to secure a foreclosure of a lien, if on the trial what he believes to constitute title should, in the judgment of the court, be only a mortgage, but to effect this, the petition must set forth facts sufficient to entitle the plaintiff to such relief. A prayer asking the alternative relief in the event the court should decide that a deed which plaintiff relies on as evidence of title is only evidence of a mortgage, without setting forth the facts which constitute it a mortgage, is not sufficient. *Nye v. Gribble*, 70 T. 458.

(2.) In suits to remove cloud from title the plaintiff must allege and show title to the land, or that he is in possession. [Story's Eq. Jur., §703; Mitford & Tyler's Pl. and Pr. in Eq., p. 249.] *Mayfield v. Heirs of Musquez*, 1 U. C. 221.

A plaintiff who pleads his title specially is confined to the title set out in his pleadings, and can only recover thereon. [11 T. 662; 39 T. 505; 47 T. 219.] *Cummins v. Denton*, 1 U. C. 181.

(3.) When a plaintiff in an action of this character pleads specially his title, and any link in the chain is dependent upon a fact resting in parol, such as heirship, etc., the fact should be alleged. Otherwise he will not be permitted to prove it. But should the petition be in the statutory form as in the present case, he will be permitted to adduce any competent parol evidence in order to establish his title, although the fact proposed to be established by such evidence be not specially pleaded. If the defendant apprehended surprise, he could, by requiring an abstract to be filed, have been apprised of the facts upon which the plaintiff relied to make out the case. *Edwards v. Barwise*, 69 T. 84.

(5.) A petition alleging ownership of land in plaintiffs, and an adverse claim by the defendants, is sufficient in alleging a cause of action without alleging possession or right of possession in the plaintiffs. *Tevis v. Armstrong et al.*, 71 T. 59.

It is not necessary, in a suit to remove cloud from title, to allege an eviction or a trespass by defendant on the premises. *Yoe & Harris v. Montgomery*, 68 T. 338.

(7.) If the facts set forth as the basis of recovery are the same in an original and in an amended petition, though the relief prayed for in the amendment may be different, the cause of action remains the same, and the defense of limitation, if not valid against the original petition, will not prevail against the amendment. If a new party plaintiff is made after the filing of the original petition, limitation runs as to such party up to the date of his making himself a party. *Telfener v. Dillard*, 70 T. 139.

A petition for "all of lot number five, in division E, in the government tract adjoining the city of Austin, and patented to H. Aikin, assignee of S. G. Sneed, on the seventh day of July, 1851, patent No. 193, volume 2, as will more fully appear by reference to the plan of said tract on file in the general land office of Texas," is not bad for want of sufficient description of the land sued for. *Edwards v. Smith*, 71 T. 156.

#### ART. 4788. Warrantor, etc., may be made party.

(1.) In trespass to try title brought against parties claiming the land as execution purchasers under a judgment rendered against plaintiff's vendor, such vendor may be made a defendant with a view of recovering against him the purchase money, should his warranty fail, and confession of judgment for the debt cannot conclude rights asserted by other defendants. In this case the party confessing judgment was made defendant for the purpose of recovering against him on the debt should his deed be adjudged to constitute a mortgage. *Nye v. Gribble*, 70 T. 458.

(2.) A warrantor whose deed conveyed no title, when sued by the former owner with his vendee as co-defendant, may set up title acquired by limitation by such vendee since the sale. *Branch v. Baker*, 70 T. 190.

(3.) The writ of error is a continuation of the original suit, and not the beginning of a new one. One who buys after judgment in the district court is rendered, and before a writ of error is sued out, is a purchaser *pendente lite*.

[*Patterson v. U. S.*, 2 Wheaton, 221, and *McCoy v. Rives*, 1 Smedes & Marshal, 592, reviewed.]

[*Crouch v. Martin*, 3 Blackford, 336; *Smith v. Raymond*, 1 Day, 189; *People v. Doesbury*, 17 Mich. 135; *Crutcher v. Williams*, 4 Humphries, 345, and *Longcope v. Bruce*, 44 T. 434, approved.] *Moore v. Moore*, 67 T. 293.

#### ART. 4790. The possessor shall be defendant.

(2.) An action of trespass to try title, prosecuted to judgment against the tenant of a non-resident landlord, does not conclude the question of title against such owner, even if he had knowledge of the pendency of the suit.

Such action would stop the running of the statutes of limitation, or would be conclusive between the parties to the suit and those claiming under them by title made subsequent to the filing of the suit. *Stout v. Taul*, 71 T. 438.

(4.) Unless partition be asked the absence of all claimants as defendants is immaterial in an action of trespass to try title. *Tevis v. Armstrong, et al.*, 71 T. 59.

**ART. 4791. May join as defendant, whom.**

(1.) Where defendants in trespass to try title claim separate tracts of land sued for they may sever in their defense. Nor is such right lost by their pleading jointly not guilty.

Such right will be protected in favor of an actual settler residing upon the lands against a subsequent purchaser.

A purchaser from a defendant after suit may properly make himself a party defendant in an action of trespass to try title. *Land Co. v. Wood*, 71 T. 460.

(3.) When in trespass to try title the defendant disclaims title, but sets up title in himself to an adjoining tract of land, and after asking for a survey to determine whether the two surveys conflict, prays that he may have judgment for costs if they do not, and for his improvements made in good faith if a conflict exists, evidence derailing plaintiff's title is unnecessary. If, however, the judgment is for the defendant, and the only assignment of error correctly prepared is based on the alleged error of the court in excluding the evidences of plaintiff's title, the judgment will be affirmed, which will carry with it the costs of the suit. *Mynders v. Ralston*, 68 T. 498.

A charge to the effect that the jury should not regard a deed read to them as evidence of title, when the grantee, who was a party to the cause, had filed a disclaimer of any interest under the deed, was not a charge upon the weight of evidence. *Frather v. Wilkins*, 68 T. 187.

(4.) When in trespass to try title the defendant files only a disclaimer, evidence which under a proper plea establishing matter of defense would be admissible, should be excluded. No judgment can be rendered on evidence not supported by allegations. *Thurmond v. Brownson*, 69 T. 597.

When in trespass to try title against several defendants the evidence discloses that none of them were in possession of a part of the premises sued for, and all having answered, failed to disclaim as to any part of the land, and the plaintiff exhibits a perfect title, the judgment should be against all the defendants for all the land to which he establishes his right, and for the costs of suit. *Koenigheim v. Miles et al.*, 67 T. 113.

When in trespass to try title the defendant disclaims as to all the land sued for except a part which he designates by metes and bounds, as to which he pleads not guilty, and on the trial it is shown that the deed under which the plaintiff claims all the land is a forgery, the disclaimer constitutes an estoppel of record, and the plaintiff will be entitled as against such defendants to a judgment for the land to which the disclaimer applies, and the defendants to a judgment for the land claimed by them. *Dodge v. Richardson*, 70 T. 209.

When in a suit of trespass to try title a writ of sequestration has issued, and the defendant in possession, who subsequently filed a disclaimer, executed a replevin bond, it was not error to permit the plaintiff's counsel to read in evidence the bond in order to show that when the suit was begun the defendant asserted claim to the land, and thereby enable plaintiff to recover his costs.

A disclaimer may relieve a party to a suit from liability for all costs incurred after it is filed, but not from costs previously incurred, if the party disclaiming is in possession, or set up claim when the suit was brought. *Capt v. Stubbs*, 68 T. 222.

**ART. 4793. What proof may be made under such plea.**

(3.) If one who is sued for title to land has equities which entitle him to demand payment of a debt before surrendering possession, he should set them up in his answer. He is not entitled to such affirmative relief under the plea of not guilty.

This case distinguished from that of a mortgagor who seeks to recover property of the mortgagee rightfully in possession under a deed absolute on its face. There the burden of showing payment of the debt is on the plaintiff, and he must do so as against the plea of not guilty. *Fuller v. O'Neal*, 69 T. 349.

When land is sold to be paid for at a future time, and a deed is executed to the vendee who executes to the vendor a mortgage to secure payment of purchase money, the legal title remains with the vendor until the land is paid for. If before payment the vendor executes a deed of conveyance for the same land to a third party, and transfers to him the unpaid notes of the first purchaser, such

party is subrogated to the rights of the vendor under the mortgage, and being in possession may, in a suit by the first purchaser in trespass to try title, show, under the plea of not guilty, that the original purchase money remains unpaid, and defeat a recovery either of the land or the possession. The fact that the deed executed by the vendor to the second purchaser was made in consummating an attempted sale under the mortgage not authorized by its terms, is immaterial. *Crafts v. Daugherty*, 69 T. 477.

In a suit by a vendor to recover possession of land conveyed by mistake, the defendant, although in his pleading he may rely on his deed alone, may show without special plea that after the discovery of the alleged mistake, the vendor received the full consideration for the land, and had agreed to let the conveyance remain undisturbed. *Wittbecker v. Walters*, 69 T. 470.

The defendant has the right, under the plea of not guilty in an action of trespass to try title, to prove such facts as may show that the plaintiff has no right to recover, and when the plaintiff claims the property as homestead, testimony of witnesses as to declarations of the plaintiff showing intention to abandon it as a homestead, is admissible without any plea on the part of the defendant alleging abandonment. No other plea than that of "not guilty" is required to admit evidence which disputes and controverts the homestead claim. [3 T. 60; 10 T. 34; 11 T. 662; 16 T. 563; 25 T. 271.] *Burcham v. Gann*, 1 U. C. 333.

(8.) The establishment of the boundary of plaintiff's land is necessary in every action of trespass to try title, when he establishes his claim to only part of the land sued for, and is an issuable fact in such case, without the necessity of special pleading for that purpose. *Koenigheim v. Miles et al.*, 67 T. 113.

(9.) Though in trespass to try title neither the plaintiff nor defendant is required to plead his title specially, yet if either one thus pleads, he will be confined to evidence of the title as pleaded. *Railway Company v. Whitaker*, 68 T. 630.

Though a defendant, who has pleaded a special defense in trespass to try title, will be confined in his defense to the special matters as pleaded, yet this does not relieve the plaintiff from the necessity of proving his title, or preclude the defendant from showing that the land sued for is not embraced in the description given in plaintiff's deeds. *Koenigheim v. Miles et al.*, 67 T. 113.

(10.) A defendant having pleaded special matter of defense, which is recited, will be confined to evidence which goes to support that defense, and evidence of other special defenses will be excluded. [21 T. 154.] *McDannell v. Horrell*, 1 U. C. 521.

(12.) A petition contained all the allegations required in a suit of trespass to try title, but it was not indorsed as required by article 4787. The defendant specially excepted, on account of the absence of the indorsement, and after pleading not guilty, set up that the plaintiff who claimed homestead rights had abandoned the husband, who afterwards died, and from whom the defendant had obtained, before his death a lease of the premises. *Held*, that without deciding in what character of case the statutory indorsement would be material, the overruling of the special exception in this case constituted no sufficient ground for reversing final judgment in favor of the plaintiff.

The plaintiff in such action is entitled, without replying to the plea of abandonment, to introduce testimony explaining her absence from her husband, so as to contradict the charge of voluntary desertion of her home. This was sufficiently accounted for by showing her husband's consent. *Bradley v. Deroche*, 70 T. 465.

#### ART. 4800. Surveyor appointed.

(1.) The report of a surveyor who has been appointed by the court during the progress of a suit, is admissible in evidence only in suits instituted to try title to land. *Wheeler v. Boyd*, 69 T. 293.

The report of a surveyor appointed by the court in a cause in which the boundary of a survey is in controversy, is entitled to no greater weight than the testimony of a witness cognizant of the facts referred to in the report. *McAninch v. Freeman*, 69 T. 445.

#### ART. 4802. Common source of title, proof of.

(3.) In trespass to try title, when plaintiff's deed shows a conveyance from a party to one portion of a tract of land, and the defendant has subsequently received a deed from the same vendor to another portion of the same tract, the defendant

is not precluded from showing that plaintiff acquired no title by his deed. If the deeds were for the same land, and the claim of title by each was through a common source, the defendant would be thereby estopped from showing a superior outstanding title in third party. *Koenigheim v. Miles et al.*, 69 T. 113.

(4.) A void tax deed purporting to evidence a sale of land in controversy for the non-payment of taxes upon the land, as the property of the owner through whom both parties claim, is admissible to show such common source, the defendant claiming under the tax deed. *Garner v. Lasker*, 71 T. 431.

**ART. 4807. May recover a part, etc., when.**

(4.) In an action of trespass to try title against several defendants, each claiming a separate part of the land sued for, and so entitled to sever in the defense, and on the trial a severance be allowed, there may be more than one final judgment.

It would follow that the fate of the judgment in favor of one or more of the defendants is not dependent upon the result of a motion for a new trial or to vacate the judgment made by the other defendants. Such motion may be allowed as to one or more defendants, without affecting the judgment as to others, and in such case, as to the others the judgment would be final.

If the plaintiff go to trial when some of the defendants are not properly served with citation, and judgment be rendered for the defendants, such trial in favor of the defendants duly served will be considered a severance as to them. Their rights are not dependent upon proceedings against those not served.

Such severance is practically recognized in this court in cases of affirmance as to some and reversal as to others, where defendants hold separate rights. *Boone v. Hulsey*, 71 T. 176.

**ART. 4808. The judgment, etc.**

(1.) When in trespass to try title the verdict is for the plaintiff generally, and the judgment is for the land described in the plaintiff's petition, if the judgment is not in accordance with the evidence as to the quantity of land to which title has been established, that fact should first have been made the subject of a motion for new trial. *Blassingame v. Davis*, 68 T. 595.

(4.) A general verdict in trespass to try title for the plaintiff only supports a judgment for the land described in the petition. *Edwards v. Smith*, 71 T. 156.

**ART. 4809. Damages, when recovered.**

(1.) It is the right of every riparian proprietor to have the stream fronting his land flow in its natural channel, and if it be diverted from that channel to his damage by obstructions, an action will lie. In such an action it is no defense that the defendant did not believe or foresee that damage would result from the obstruction.

If a river is cutting away a bank, its owner may resort to such means as will confine it to its natural channel, but if obstructions be placed in the stream which so change the channel as to cause destruction to the land of another riparian proprietor, an action will lie to recover damages, without reference to the degree of care taken to avert the injury, or the inability of the defendant to foresee it. *Armendaiz v. Stillman et al.*, 67 T. 458.

(2.) In trespass to try title the general law of limitation as to an injury done the estate of another does not apply. In such suits the law [Civil Stats., Arts. 4809, 4814 and 4815] regulating proceedings in trespass to try title governs. *Railway v. Poindexter*, 70 T. 98.

(3.) One who purchased at tax sale a title to land which he was afterwards advised by legal counsel that he had acquired a good title to, sold it to another who cut timber thereon. In a suit brought by the real owner against the vendor, and also against his vendee who committed the trespass, to recover the land as well as damages for the trespass, *held*:

1. The real owner could not maintain his action of trespass against the vendor, unless it appeared that he acted in concert with his vendee in the illegal act, or that injury was the natural and proximate result of some act done by them.

2. Though the vendor knew that the vendee was engaged in the lumber business, and may have supposed that he purchased the land in order to cut timber from it, the sale alone was not the proximate cause of the injury. *McClanahan v. Stephens and Wife*, 67 T. 354.

## CH. 2.—CLAIM FOR IMPROVEMENTS.

ART.  
4813. Suggestion of improvements in good faith. *Annotated.*  
4814. Issue as to improvements. *Annotated.*

ART.  
4815, 4816. See Civil Statutes.  
4817. Writ of possession not to issue, etc. *Annotated.*  
4818 to 4821. See Civil Statutes.

## ART. 4813. Suggestion of improvements in good faith.

(1.) Appellants bought the land March 6th, 1883, under an invalid order of sale, and at once took possession and made thereon valuable improvements. Appellee bought the land under a valid order of sale against the same defendant, and brought suit May 11th, 1883, for the land. Appellants before the suit had completed their improvements. They sought to recover the value of these improvements. *Held:*

1. As appellee could not have claimed, under the statute, compensation against the defendant in execution had he instituted suit within one year from their entry, neither could such claim be asserted against the plaintiff who held the title of such defendant in execution.

2. Where both parties plaintiff and defendant claim the land in controversy from the same grantor, and the junior claimant holds the title, the senior claim being invalid, the junior and better title has all the rights of the common source, and the claimant under the imperfect title cannot tack his possession to the common grantor so as to make out a claim for improvements as a good faith possessor for twelve months. *Whittaker v. Allday*, 71 T. 623.

(2.) To constitute one a possessor in good faith, he must not only believe that he is the true owner, and have reasonable grounds for that belief, but he must be ignorant that his title is contested by one having or claiming a better right, unless he has strong grounds to believe that the adverse claim is destitute of legal foundation. If, by investigating the records of his county, he can ascertain that his own title, which contains only a special warranty, is worthless, and he improves the land, he cannot, on eviction of the true owner, be regarded as a possessor in good faith, and be entitled to compensation for his improvements. *Parrish v. Jackson*, 69 T. 614.

(4.) A void tax sale involves no equity that would subrogate the purchaser to rights of the state for taxes paid, and entitle him to reimbursement from the true owner when sued by him to recover land. [See opinion for authorities cited.] The same rule obtains as to taxes paid the state to redeem land which had been sold for non-payment of former taxes. *McCormick v. Edwards*, 69 T. 106.

(5.) A voluntary payment of taxes by a defendant in trespass to try title, against whom the plaintiff obtains judgment for the land, can constitute no basis for a claim for reimbursement against the true owner. *Capt v. Stubbs*, 68 T. 222; *Broxson v. McDougal*, 70 T. 64.

A plea by the defendant in trespass to try title claiming compensation for improvements made in good faith, setting up that the land was sold for taxes due in the year 18— and that the sale was made in the year 1878, under which defendant claimed, should be stricken out on special exception. *Railway v. Poin-dexter*, 70 T. 98.

As a general rule, where property is sold for the purpose of satisfying a lien, and the sale is set aside, the purchaser becomes subrogated to the rights of the lien holder, and may enforce for his own benefit the lien against the property. [*French v. Grenet*, 57 T. 274; *Howard v. North*, 5 T. 290.] This is called by an eminent text writer an equitable assignment. [3 *Pomeroy's Equity*, Sec. 1211, note 1.] But it seems that our courts hold that a void tax deed carries with it no equities. [*Robson v. Osborne*, 13 T. 298; *Pitts v. Booth*, 15 T. 453.]

After a careful research we have found no case in which a purchaser at a void tax sale has, without the aid of a statute, been permitted to recover even the taxes lawfully assessed upon the land and paid by his purchase. *McCormick v. Edwards*, 69 T. 106.

(6.) If one has good reason to believe that titled land is vacant and unappropriated public domain, and, having the requisite qualifications of a pre-emptor, settles upon and improves it, and without such fault in his settlement and occu-



pancy as would vitiate the good faith thereof, on eviction, he will be entitled, under the terms of the statute, to compensation for his improvements.

One may be a possessor in good faith who knows of the claim of title by another, if he has reasonable and strong grounds to believe in the soundness of his own title. As a general rule, to constitute one a possessor in good faith, he must not only believe that he is the true owner and have reasonable grounds for that belief, but he must be ignorant that his title is contested by one having a better right.

One claiming pay for improvements as a possessor in good faith, may show that he possessed the premises and improved them, after a decision by a court of competent jurisdiction pronouncing the adverse title a forgery. *Gaither v. Hanrick*, 69 T. 92.

An imperfect deed may be a sufficient basis for the claim for valuable improvements made by a good faith possessor under such deed. *Coker v. Roberts*, 71 T. 598.

#### ART. 4814. Issue as to improvements.

(1.) A general verdict in trespass to try title for the plaintiff when there is a claim for improvements by defendant, and a charge by the court with reference thereto, is in effect a finding against the claim. *Broxson v. McDougal*, 70 T. 64.

(2.) When the verdict in trespass to try title, rendered in a cause in which there is a claim for improvements, made in good faith, is not responsive to the issues required to be passed on in article 4814, Revised Statutes, the judgment must be reversed. *Collins v. Kay*, 69 T. 365.

(4.) The statute regulating the rights of parties when improvements have been made in good faith on the lands improved and occupied by one who is not the owner, is applicable only to such improvements as, when made, constitute a part of the realty, and has no application when the improvements were made under such circumstances as constituted them personal property. *Harkey v. Cain*, 69 T. 146.

The law of improvements in good faith is applicable to such as have been placed upon land by a defendant, under such circumstances as to make them a part of the realty. It has no application to a case in which the claim is that the property placed upon the realty never was a part of it. The jury having found that the improvements in this case belonged to a defendant, and, in effect that they were personal property, the court did not err in decreeing that the defendants had the right to remove them, and in allowing a reasonable time for that purpose. The case called for the interposition of the equitable powers of the court, and they were properly exercised. *Harkey v. Cain*, 69 T. 146.

#### ART. 4817. Writ of possession not to issue, etc.

(1.) When in an action of trespass to try title and to recover possession, the plaintiff has obtained a writ of sequestration, and the verdict is in his favor, no damages can be awarded for wrongfully suing out the writ, even in favor of a defendant in possession who is found to have made improvements on the property in good faith.

Under first section of the act of February 5th, 1840, substantially re-enacted in the statute [Civ. Stats., Art. 4813], a plaintiff in trespass to try title, who recovers judgment against a defendant in possession in good faith who has made valuable improvements, is afforded a remedy reasonable in itself under which he may obtain the possession after doing equity. Equity requires that he shall first pay the excess of value of the improvements over the rents, and the law in requiring this does not delay the plaintiff in his remedy, but the courts will not by construction extend the operation of the statutes in favor of a possessor in good faith beyond this. *Van Valkenburgh v. Ruby*, 68 T. 189.

## TITLE 97.—TRIAL OF RIGHT OF PROPERTY.

## ART.

4822. See Civil Statutes.

4823. Bond, its requisites and effect. *Annotated.*

4824 to 4830. See Civil Statutes.

4831. Jurisdiction. *Annotated.*

4832. See Civil Statutes.

4833. Issue to be made up, etc. *Annotated.*

## ART.

4834. Requisites of issue. *Annotated.*

4835 to 4838. See Civil Statutes.

4839. Burden of proof on defendant, when. *Annotated.*

4840 to 4844. See Civil Statutes.

4845. Return of property within ten days. *Annotated.*

4846, 4847. See Civil Statutes.

## ART. 4823. Bond, its requisites and effect.

(4.) The proper practice when property is levied on by two or more writs of attachment, and is claimed by one other than the defendant in attachment, is to execute one claim bond payable to all the plaintiffs in the writs. [Green v. Banks, 24 T. 508, reviewed.] Elser v. Graber, 69 T. 222.

Where property is seized under several writs, a claim bond for the trial of the right to the property is properly made payable to the plaintiffs in all the writs levied, and but one bond is necessary or proper. Harness Co. v. Schoelkopf, 71 T. 418.

## ART. 4831. Jurisdiction.

(5.) The assessment of value placed on property by the officer who seizes it under attachment should determine the jurisdiction on the trial of the right of property, and not its value as subsequently ascertained on trial. Cleveland v. Tufts, 69 T. 580.

## ART. 4833. Issue to be made up, etc.

(1.) A claimant in an action for the trial of the right of property may amend as in any other action, and claim such damages as he may have sustained from the illegal seizure of his property. The right to amend is confined to no particular class of actions. Cleveland v. Tufts, 69 T. 580.

## ART. 4834. Requisites of issue.

(2.) A claimant in presenting issues under the statute must state the nature of his claim to the property. Where such claimant alleged a purchase from one of the defendants against whom the writ extended, which purchase was successfully attacked for fraud, he cannot take advantage on the trial of testimony developing that his vendor had a partner owning half interest in the property, so as to reduce the effect of the attack upon his contract of purchase to the separate interest of his vendor. Choate v. McIlhenny Co., 71 T. 119.

## ART. 4839. Burden of proof on defendant, when.

(1.) In a suit involving title to property seized under attachment and claimed by a third party, while the trial judge must in the first instance determine in whose possession the property was when it was seized under process, it does not follow that in a proper case the court should not submit to the jury the question of fact on which the determination of the burden of proof must rest. Brown et al v. Lessing et al., 70 T. 541.

(3.) When, in a proceeding under the statute for the trial of the right of property to goods, the return of the sheriff does not disclose in whose possession the property was found when a writ of attachment was levied, the burden of proving that the goods were in the possession of the defendant in attachment is upon the plaintiff. Boaz & Co. v. Schneider & Davis, 69 T. 128.

## ART. 4845. Return of property within ten days.

(2.) The claimant of goods in a proceeding for trial of right of property, after filing his claim and bond, but before final judgment against him, transferred his interest in the property to a third party. After judgment the claimant purchased the property from a purchaser thereof at tax sale, but it remained in the possession of his former vendee. The property was not (according to the finding of facts by the court) delivered by the claimant to the sheriff within ten days after the final judgment in the proceedings for trial of the right of property as required by statute. Afterwards the plaintiff levied and sold real estate of the claimant to satisfy

his judgment, but before a sheriff's deed was made, or purchase money paid, this suit was brought to restrain the plaintiff from proceeding with the collection of his judgment, and against the sheriff and purchaser at sheriff's sale, to enjoin payment of the money and the delivery of the deed, *held*:

1. A statement made by the attorney of the claimant to the deputy sheriff within ten days after final judgment that the attorney wanted to deliver the property which was replevied and which was in the possession of claimant's vendee (the property being several hundred yards distant), was not, though assented to by the officer, a delivery of the goods. This held, in connection with the facts that the officer went at once to consult the party in possession to have the goods checked off before receiving them; that he never found him; that he never obtained his authority to receive the goods in satisfaction of the judgment; that no order for the goods was given on the party in possession, and his consent that the officer should receive them was not shown.

2. The claimant was entitled to a levy on other property if the goods claimed were not of value sufficient to satisfy his judgment, and a failure to show in the petition that the amount bid for the land was not in excess of the judgment after crediting it with what the goods claimed would have brought at forced sale, was fatal to the proceeding by injunction.

3. If the claim in the right of property proceeding was not sustained, no matter for what reason, the bondsmen of the claimant were bound to return the property or its value in ten days.

4. The rights of a creditor, to secure whose debt property has been seized, cannot be affected by any transactions between a third party claiming it and others, which occur after the rights of the creditor are fixed under the claim judgment and when the property has not been returned. *Garrity et al. v. Thompson et al.*, 67 T. 1.

## TITLE 97a.—TRUSTS; CONSPIRACIES AGAINST TRADE.

**ART. 4847a. (New.)**

- §1. Trusts defined.
- §2. Domestic corporation violating law forfeits charter.
- §3. Proceedings for forfeiture of domestic corporation.
- §4. Foreign corporation violating this act prohibited from doing business.
- §5. Proceedings to forfeit charter conducted, how.
- §6. Violations of this act punished by fine and imprisonment.

**ART. 4847a. (New.)**

- §7. Requisites of indictment.
- §8. Evidence defined.
- §9. Persons without this state subject to indictment.
- §10. Penalty for violation of this act.
- §11. Contract in violation of this act void.
- §12. Provisions of this act cumulative.
- §13. Act does not apply to agricultural products and live-stock, when.

**ART. 4847a, §1. Trusts defined.**

A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: *First*—To create or carry out restrictions in trade. *Second*—To limit or reduce the production, or increase or reduce the price of merchandise, or commodities. *Third*—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. *Fourth*—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state. *Fifth*—to make or enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

**§2. Domestic corporation violating this act forfeits charter.**

That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

**§3. Proceedings for forfeiture of charter of domestic corporation.**

For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney-general or district or county attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or *quo warranto* proceedings in Travis county, at Austin, or at the county seat of any county in the state, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

**§4. Foreign corporation violating the law prohibited from doing business.**

Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the attorney-general to enforce this provision by injunction or other proper proceedings in the district court of Travis county, in the name of the State of Texas.

**§5. Proceedings to forfeit charter conducted, how.**

The provisions of chapter 48, General Laws of this state, approved July 9th, 1879, to prescribe the remedy and regulate the proceedings by *quo warranto*, etc. (Civ. Statutes, Art. 4098i.), shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

**§6. Violation of this act punished by fine and imprisonment.**

Any violation of either or all the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

**§7. Requisites of indictment.**

In any indictment for an offense named in this act it is sufficient to state the purpose, or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created.

**§8. Evidence defined.**

In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

**§9. Persons without this state subject to indictment, etc.**

Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act which do not in their commission necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions whether within or without the state.

**§10. Penalty for violation of this act.**

Each and every firm, person, corporation, or association of persons, who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney-general or the district or the county attorney to prosecute for and recover the same.

**§11. Contracts in violation of this act void.**

Any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

**§12. Provisions of this act cumulative.**

The provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state.

**§13. Act does not apply to agricultural products or live-stock, when.**

The provisions of this act shall not apply to agricultural products or live-stock while in the hands of the producer or raiser. [Act March 30, 1889; 21 Leg. p. 141.]

## TITLE 97b.—TRUSTEES' SALES.

**ART. 4848b.** (*New.*) Sale of real estate under deed of trust, etc., made how.

**ART. 4848b. Sale of real estate under deed of trust, etc., made how.**

All sales of real estate which may hereafter be made in this state under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated, notice shall be given as now required in judicial sales, and such sales shall be made at public venue, between the hours of 10 o'clock A. M. and 4 o'clock P. M. of the first Tuesday in any month; *provided*, that when such real estate is situated in an unorganized county such sale shall be made in the county to which such unorganized county is attached for judicial purposes, and where such real estate is situated in two or more counties the sale may be made in any county where any part of the real estate is situated, after notice as required in judicial sales has been given in every county in which any part of such real estate is situated. [Act March 21; July 6, 1889; 21 Leg. p. 143.]

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## TITLE 98.—WEIGHTS AND MEASURES.

**ART.**  
4848 to 4852. See Civil Statutes.  
4852a. Commissioner of agriculture  
may sell weights and meas-  
ures. *New.*

**ART.**  
4853 to 4856. See Civil Statutes.

**ART. 4852a. Commissioner of agriculture may sell weights and measures.**

The commissioner of agriculture, insurance, statistics, and history is hereby authorized to sell sets or parts of sets of standard weights and measures heretofore manufactured in accordance with article 4850, Revised Statutes, at the present cost of manufacturing. [Act April 6, 1889; 21 Leg. p. 32.]

## TITLE 99.—WILLS.

## ART.

4857. See Civil Statutes.

4858. What may be devised, etc., by will. *Annotated.*

4859, 4860. See Civil Statutes.

## ART.

4861. Revocation of written will. *Annotated.*

4862 to 4875. See Civil Statutes.

4876. Rules as to construction of wills. *Annotated.*

## ART. 4858. What may be devised, etc., by will.

(8.) A will devising land to such of the testator's children "as shall move on it before the 1st day of January, 1870, or before my decease," is not contrary to public policy and good morals; the condition requiring them to move on the land within a specified time was a condition precedent, and devisees failing to comply were not entitled to claim under the will. [2 Redf. on Wills, 283; 1 V. & B. 248.] *Cliett v. Cliett*, 1 U. C. 407.

## ART. 4861. Revocation of written will.

(2.) The effect of a codicil ratifying, confirming and republishing a will is to give the same force to the will as if it had been written, executed and published at the date of the codicil, and all the provisions of the will not inconsistent with the codicil will stand. *Cliett v. Cliett*, 1 U. C. 407.

## ART. 4876. Rules as to construction of wills.

(6.) When a will clearly by its terms evidences that a different meaning is intended to be given to the use of words employed in expressing the testator's wish from that which would attach under a technical construction of the terms employed, the technical meaning will be disregarded and the testator's intention prevail. See opinion for facts illustrating the rule.

Words used in a will must be considered with reference to the surroundings of the testator when the will was made, and extrinsic evidence touching the surroundings of the testator at the time with regard to his family property and himself is admissible to enable the court to discover the meaning intended to be conveyed by the terms employed in the will. This rule will not authorize parol evidence to contradict, add to or explain the contents of a will by showing declarations made by the testator before, at the time, or subsequent to the execution of the will.

See opinion for facts held insufficient to impress on property possessed by husband and wife at the time of the wife's death the character of separate property of the wife. *Peet et al. v. Railway*, 70 T. 522.

(21.) In construing a will, all of its provisions should be regarded for the purpose of ascertaining the intention of the testator, and if any particular paragraph of the will indicates an intent variant from that which is manifest from a consideration of all the other provisions, the general intent thus manifest must prevail.

The words, "I will and desire," when used in a testamentary paper, indicate a mental decision that something shall be done or refrained from, and makes this mandatory rather than directory.

When the same words are used in different parts of the will relating to the same subject matter, the presumption exists that the testator intended that they should have the same signification, unless there is something in the context indicating that they were used in a different sense.

A will contained the following clauses: "3d. It is my will and desire that my beloved husband shall have all my property, both real, personal and mixed, whatever the interest may be, whether separate or community interest. And that he shall have full power and control over same, to sell and dispose of as he may desire." "4th. It is my will and desire that at his death, should he have any of said property still remaining in his possession, not disposed of by him, that the same shall be given by him to my nieces, Jessie McMurry and Flora Brown, daughters of Vina and Taylor Brown." In a contest between the executor of the husband named in the third clause, and the beneficiaries under the fourth clause held,

1. The third paragraph of the will cannot be construed so as to pass to the surviving husband an absolute estate in fee, for his sole benefit, without nullifying the succeeding paragraph.

2. Though the third paragraph of the will vested in the surviving husband an estate in fee, it was a fee in trust for the beneficiaries named in the fourth para-



**T. 99a, 100.] WOOL GROWING INTERESTS—WRECKS. Arts. 4876a—4891**

graph of the will, except as their right was limited by the authority vested in the husband by express terms to dispose of the estate during his life.

3. The doctrine that the absolute power of disposition given to one who is constituted the first beneficiary under a written instrument, for his own benefit, renders a subsequent limitation void for repugnancy, should not be applied to wills, when it clearly appears (construing the entire will) that the testator did not intend that such first beneficiary should have an absolute estate in fee for his own use and benefit.

4. The testatrix must have intended from the language used to leave her surviving husband no discretion as to how he should dispose by last will of the property she devised, and which at his death he had not alienated.

5. The objection that the trust created by the fourth paragraph of the will was not sufficiently certain, is without force. It could be made certain by ascertaining what property received by him under the wife's will remains undisposed of by the husband by deed or gift up to the time of his death. *McMurry v. Stanley*, 69 T. 227.

(27.) A testator who died in 1852, and who, at his death, lived with his wife and children on six hundred and forty acres of land which was community property, gave to his five daughters one hundred and eight acres each, and the remaining one hundred acres, on which the homestead was situated, he gave to his wife, during her life, with remainder in fee to one of appellees, who was the daughter of his wife. The widow and all immediate beneficiaries recognized the will, and received the property bequeathed to them. The surviving widow, in 1857, conveyed the homestead hundred acres to appellant, who was one of the five daughters, who held possession thereof until 1883, when suit was brought by the appellee to recover the one hundred acres devised to her in remainder, the widow having died in 1882. *Held:*

1. Though the will evinced a purpose to dispose of the wife's community interest in the six hundred and forty acres, it conferred on the wife a right she did not possess under the laws in force, for, under the law as then existing, the homestead belonging to a solvent estate would have been subject to partition as other property.

2. The presumption that would otherwise obtain that the testator intended to dispose of only his undivided interest, is repelled by the specific bequest which included the entire tract, and by the estate in remainder.

3. The partition between the widow and children, in accordance with the provisions of the will, and the deed from the widow to appellant, who was one of them, conveying the homestead tract, showed the election of the widow to take under the will, and the knowledge of appellant of its provisions.

4. The declarations of the widow to the effect that her husband had given all the children land except the appellee, and she was to have the land the widow lived on after her death, were admissible to prove knowledge on the part of the widow of the provisions of the will.

5. Limitation did not run against the appellee, who was under coverture from the date of the deed made by the widow until the death of the latter, and a judgment in her favor for the one hundred acres devised to her in remainder was affirmed. *Rogers v. Trevathan and Wife*, 67 T. 406.

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## **TITLE 99a.—WOOL GROWING INTEREST.**

**ART. 4876a.** See Civil Statutes.

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## **TITLE 100.—WRECKS.**

### **CH. 1.—OF WRECK MASTERS.**

**ARTS. 4877 to 4885.** See Civil Statutes.

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### **CH. 2.—OF COTTON SALVAGE.**

**ARTS. 4886 to 4891.** See Civil Statutes.

## FINAL TITLE.—MISCELLANEOUS DECISIONS.

## LAND ACT.

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| <p>§1. Land act of 1883 and contracts under it valid.</p> <p>§2. Fraud in lease or sale does not render contract void.</p> <p>§3. Interest on purchase money due, when. Extension of time for payment valid.</p> <p>§4. Land board, jurisdiction of.</p> <p>§5. Land in Greer county not subject to sale or lease by land board.</p> <p>§6. Occupancy of public lands forbidden.</p> <p>§7. Public school lands belong to the state, and subject to lease or sale.</p> <p>§8. Minimum price of lease fixed by law.</p> <p>§9. Lease for greater than minimum price valid.</p> | <p>§10. Competitive bids not necessary to validity of sale.</p> <p style="text-align: center;"><i>Rules of the Supreme Court.</i></p> <p>§11, Rule 29. Brief prepared, how.</p> <p style="text-align: center;"><i>Rules for the District Court.</i></p> <p>§12, Rule 19. Exhibits in pleading, effect of.</p> <p>§13, Rule 47. Agreements, how made and enforced.</p> <p>§14, Rule 50. Attorney, etc., shall not be surety in pending cause.</p> <p>§15, Rule 65. A cause submitted to the judge determined, when.</p> <p>§16, Rule 88. Index to transcript.</p> <p>§17. Removing cases to federal court.</p> |
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**§1. Lease of school lands.**

The act of April 12, 1883 [2 Civil Statutes, p. 689], and contracts for lease of public school lands made in accordance therewith are valid.

No new offices were created or attempted to be made by the act constituting the heads of the executive department as the land board, with duties as such. *Arnold v. The State*, 71 T. 239.

**§2. Public land—Fraud.**

A lessee from the state under the act of 1883 [2 Civil Statutes, §17, p. 694], applied to lease six hundred and forty acres of land as "dry pasture land." After the lease was made, an actual settler applied for and purchased the land as "dry land," paying the price, going into possession and making the improvements required by law. In a contest between the lessee as plaintiff and the purchaser, after the plaintiff had pleaded his lease, in which the land was designated as dry land, he offered in evidence his second application to lease, made after the purchase by the actual settler, in which the land was designated as "watered land," held:

1. The admission of the second application and the lease thereunder was erroneous, since a recovery was sought expressly under the original lease, the action could not be sustained under the second lease.

2. Though the section was in fact watered land, and had been misrepresented to the officers of the state by both the lessee and the purchaser, no one but the state could complain of the fraud, and as between the parties, the actual settler who had consummated his purchase was entitled to recover. *Nobles v. Cattle Co.*, 69 T. 434.

**§3. Purchaser of school land.**

An actual settler in good faith, who purchased school land under the provisions of the act of April 12th, 1883 [2 Civil Statutes, p. 689, §5], and paid one-thirtieth of the purchase money and one year's interest, in January, 1884, his application to purchase having been made in December, 1883, thereby satisfied all claim in favor of the state for interest for one year after the date of the purchase, and the land was not subject to forfeiture for non-payment of interest for the year 1884. He had until the first day of March, 1886, to pay the second installment of interest. That time was extended by the act of February 16th, 1886, until the first day of August, 1886.

A law will not be declared unconstitutional unless it is clearly so, and in cases of doubt it will be held valid.

The power of the Legislature, under the Constitution, to pass an act to suspend for a time the right of the state to forfeit the right of purchasers of school

lands for non-payment of interest, is a matter of such doubt as to render it improper for the supreme court to declare the act unconstitutional. *Barker v. Torrey*, 69 T. 7.

**§4. Land board—Jurisdiction of.**

The act of April 12th, 1883, entitled: an "An act to provide for the classification, sale and lease of the lands heretofore surveyed and set apart for the benefit of the common school, university, the lunatic, blind, deaf and dumb and orphan asylum funds [2 Civil Statutes, p. 6-9], designates the lands authorized to be sold and leased in the words of the caption.

The sixteenth section of said act, providing the manner of leasing the lands, must be taken to apply to the lands described in the first section of the act, which first section describes the lands to which the act was intended to refer.

This construction is imperative from that provision in the Constitution which requires that the subject of a bill shall be expressed in its title.

The statute did not affect any land except the school, university and asylum lands, and then only after they had been surveyed and set apart. *The State of Texas v. The Day Land and Cattle Co.*, 71 T. 252.

**§5. Lands in Greer county.**

By act of February 25th, 1879 [2 Civil Statutes, Art. 4037c], the vacant lands in Greer county were appropriated one-half to the public free schools and the other for the payment of the public debt, and that the lands should be surveyed and disposed of in such manner as should be prescribed by law. No law had provided for such surveying and disposition of these lands at the time of the acts drawn in question in this case, and it follows that the act of the land board without such or any authority was unauthorized and void.

As the law did not authorize an express lease, none could be implied from the acts of the parties. *The State of Texas v. The Day Land & Cattle Co.*, 71 T. 252.

**§6. Occupancy of public land forbidden.**

The act of February 4th, 1884 [Criminal Statutes, §716], prohibiting the grazing, etc., upon public land without lease, in effect forbade the private occupancy of the lands not subject to the land board under penalties, etc. It was the policy of the law that such lands should be for the use of the people in general.

This action was not brought for the penalty prescribed for such invasion of public rights, and relief was properly refused. *The State of Texas v. The Day Land & Cattle Co.*, 71 T. 252.

**§7. Public school land.**

Article 7, section 2, of the Constitution [4 Civil Statutes, p. 552], setting apart the alternate sections of land reserved, etc., and all money from the sale thereof, for the support of public schools, does not constitute the relation of trustee on part of the state seized of the lands for the use of another with power of sale added. The lands belong to the state as fully as they did before they were appropriated to the public purpose by the Constitution. No inhibition against leasing the school lands can be properly drawn from this dedication of the lands. The dedication simply withdraws from the Legislature the power to appropriate the land to any other purpose.

Section 4, of article 7, of the Constitution [4 Civil Statutes, p. 553], providing for the sale of the school lands, is mandatory, and leaves no discretion in the Legislature as to the mode in which the lands shall be ultimately utilized; and a lease without reservation of right to sell would be against this provision.

That the lands are to be sold does not inhibit the temporary leasing of the lands until sales may be made.

That in the Constitutional Convention the express power to lease was discussed and abandoned does not control the effect of the terms used in the Constitution; for the question ultimately is *what* did the people adopt as the Constitution, and their action was upon the instrument as voted upon.

The proceedings of the Constitutional Convention may be referred to to ascertain the meaning of a clause in the Constitution, when such clause is obscure.

A power clearly legislative in its character not expressly denied to the Legislature ought not to be held to be denied by implication, unless its exercise would obstruct the exercise of a power expressly granted.

Sections 16 and 17 of act of April 12th, 1883 [2 Civil Statutes, p. 689], and the leases made under the same, expressly reserving the right to sell the land at any

time, although leased, interposed no hindrance to the full exercise of the express power given to the Legislature to sell the school lands. Such lease of school land is lawful. *Smisson v. The State*, 71 T. 222.

**§8. Minimum price per acre.**

The Legislature in effect, in prescribing the duties of the land board, enjoined upon them to lease to such persons as would pay four cents per acre per annum, unless more be offered, when the lease shall be to the one bidding more, upon his complying with the regulations for the security of the rental to the state. The action of the board in fixing another minimum price was inconsistent with law under which the board was acting, and, therefore, void. *Smisson v. The State*, 71 T. 222.

**§9. Lease for greater than minimum valid.**

The appellant having bid the larger sum, the land was awarded to him, he executed the lease contract for the larger sum; having done so he is liable for the stipulated rent. His act in making the contract was voluntary, and the land board had the power to make the lease. *Smisson v. The State*, 71 T. 222.

**§10. Competitive bids.**

It was not necessary that there should be competitive bids. All the law required was that opportunity for such bids should be given. This was exacted by the regulations of the land board. *Smisson v. The State*, 71 T. 222.

**RULES FOR THE SUPREME COURT.**

**§11. RULE 29. Brief prepared, how.**

When in disregard of this rule the propositions contained in appellant's brief are made not only without regard to the assignments of error, but are not numbered as the assignments of error are, rendering it impossible to determine under which assignment either or any of such propositions are made, the judgment of the court below should be affirmed without exploring the record to ascertain if there was error. *Land Co. v. Chamberlain*, 70 T. 188.

**RULES FOR THE DISTRICT COURT.**

**§12. RULE 19. Exhibits in pleading.**

When a paper is made an exhibit in a plea, and its verity is alleged, it must be taken in aid and explanation of the averments in the pleading which refer to it. *Milliken v. Callahan Co.*, 69 T. 206.

**§13. RULE 47. Agreements, how made and enforced.**

An agreement of counsel in regard to the trial of a cause will not be always observed by a court, although it may be in writing, and is not to be treated as a contract to be enforced under all circumstances. Such an agreement may be set aside by the court, in the exercise of a sound discretion, when its enforcement would result in serious injury to one of the parties, and the other party would not be prejudiced by its being disregarded. See opinion for an agreement of an attorney to continue a cause, made without the knowledge of his client, who disapproved thereof and employed other counsel, which agreement was properly disregarded by the court. *McClure v. Sheek*, 68 T. 426.

The action of the trial judge, after hearing statements of counsel for parties litigant in regard to a parol agreement to waive filing of title deeds and notice thereof, in enforcing such agreement, constitutes no ground for a reversal of judgment. *Jenkins v. Adams*, 71 T. 1.

**§14. RULE 50. Attorney shall not be surety in pending cause.**

This rule was merely intended to protect the officers of the court against the importunity of litigants; that it is merely directory, and hence, if an officer become a surety in contravention of the rule, his act is neither void nor voidable. The purpose of the regulation is sufficiently accomplished by punishing the offender for contempt of court without holding the bond a nullity. *Kohn v. Washer*, 69 T. 67.

**§15. RULE 65. A cause submitted to the judge, when.**

When a judgment is rendered by the trial judge within two days from the adjournment of the term, in a cause submitted to him in disregard of rule 65, the judgment will not, for that cause, be reversed, unless exceptions were taken at the time. *Glenn v. Kimbrough*, 70 T. 147.

An amendment of a judgment, under article 1355, Civil Statutes, which is made on the last day of the term, but which is of a character authorized by the statute to be made at any time, is not, when the case was first submitted for determination by the judge, on the law and the facts, more than three days before the close of the term, within this rule. *McPherson v. Johnson*, 69 T. 484.

**§16. RULE 88. Index to transcript.**

The index must conform to the order in which each proceeding appears in the transcript, and not alphabetically. *Blankenship v. Thurman*, 68 T. 671.

**§17. Removing cases to federal court.**

An order made in a federal court in a cause which had been transferred from a state court, and which had been dismissed in the federal court on the ground that it had no jurisdiction, cannot control or limit the state court in its subsequent proceedings. Such order would be persuasive to a state court only.

When, after an order of a state court for the removal of a cause to a United States court, it is decided by the Supreme Court of the United States that there was no sufficient cause for removal, thus affirming a like decision of the Circuit Court of the United States, a certified copy of the mandate of the Supreme Court of the United States, issuing from the circuit court, when filed in the state court from which the removal was attempted, is sufficient evidence of the refusal of the federal court to assume jurisdiction, and no further order of the circuit court relinquishing jurisdiction is necessary to enable the state court to proceed to judgment in the case. *Seeligson v. Transportation Co.*, 70 T. 198.

Where, against one of several defendants, in a Texas state court, who is a resident citizen of another state, a recovery is sought in which his co-defendants have no interest, and such defendant brings himself within the terms of the law entitling him to remove the cause to a United States court, the entire suit involving the rights of all the defendants must be removed.

See opinion for facts under which it was held, after a motion to quash service and dismiss the suit had been made, and the application to transfer the cause to a United States court was made at the succeeding term, that such application was made at the first term, and was in time, within the meaning of the act of March 20th, 1875. *Felbleman v. Edmonds*, 69 T. 335.

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REVISED  
PENAL CODE  
AND  
CODE OF CRIMINAL PROCEDURE  
AND  
PENAL LAWS  
OF  
THE STATE OF TEXAS,

PASSED BY THE 20TH LEGISLATURE AT THE SPECIAL SESSION CON-  
VENED APRIL 16TH, 1888, AND ADJOURNED MAY 15TH, 1888,

AND  
BY THE 21ST LEGISLATURE, CONVENED JANUARY 8TH, 1889, AND  
ADJOURNED APRIL 6TH, 1889,

TOGETHER WITH NOTES OF DECISIONS IN 24 APPEALS RELATING  
TO THE PENAL CODE, AND ALL OF THE DECISIONS IN 25  
AND 26 APPEALS AND IN PART OF 27 APPEALS.

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SUPPLEMENT FOR 1889.

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ANNOTATED BY  
JOHN SAYLES AND HENRY SAYLES,  
OF ABILENE, TEXAS.

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ST. LOUIS, MO.:  
THE GILBERT BOOK CO.  
1889.

(30—Sup. Tex. Stat.) 465



## EXPLANATORY.

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This work is a continuation of the Texas Criminal Statutes, annotated by Hon. Sam A. Willson, which included the Penal Code and Code of Criminal Procedure and Penal Laws passed by the 16th, 17th, 18th, 19th and 20th Legislatures, and notes of the decisions in criminal cases to the date of its publication. The official duties of Judge Willson occupying his entire time until the adjournment of the Court of Appeals on the last Saturday in June, at his request the preparation of this work was undertaken by the authors, in order that the Criminal Statutes, in connection with the Civil Statutes, might be published at the earliest possible date.

The arrangement of the statutes and notes of decisions adopted by Judge Willson has been followed in this work. The Penal Code is divided into articles, numbered Art. 1 to Art. 821. The Code of Criminal Procedure is divided into articles, numbered Art. 1 to Art. 1113.

The notes of decisions in criminal cases are arranged under the articles to which they relate, and the articles and notes in the two Codes are numbered consecutively, commencing with §1, Art. 1, of the Penal Code, and ending with §2930, Art. 1113, of the Code of Criminal Procedure.

The general index follows the Code of Criminal Procedure and refers to the number of the section, and also the number of the article when the reference is to the statute. Thus §3, Art. 3, refers to Art. 3 of the Penal Code. The reference §4 refers to decisions under Art. 3. The reference §1429, Art. 3, refers to Art. 3 of the Code of Criminal Procedure. The reference §1430 refers to decisions under Art. 3 of the Code of Criminal Procedure.



# THE PENAL CODE.

## TITLE 1.—GENERAL PROVISIONS RELATING TO THE WHOLE CODE.

### CH. 1.—THE GENERAL OBJECTS OF THE CODE, THE PRINCIPLES ON WHICH IT IS FOUNDED, AND RULES FOR THE INTERPRETATION OF PENAL LAWS.

§1, Art. 1 to §56, Art. 20. See Penal Code.

### CH. 2.—DEFINITIONS.

§57, Art. 21 to §68, Art. 31. See Penal Code.

### CH. 3.—THE PERSONS PUNISHABLE UNDER THIS CODE, AND THE CIRCUMSTANCES WHICH EXCUSE, EX-TENUATE OR AGGRAVATE AN OFFENSE.

§69, Art. 32 to §73, Art. 34. See Penal Code.

§74. Discretion may be proved. *Annotated.*

§75, Art. 35 to §91, Art. 40. See Penal Code.

§92, Art. 40a. Intoxication as a defense; statute regulating. See Penal Code.

§93. See Penal Code.

§94. Decisions under the statute. *Annotated.*

§95, Art. 41 to §108, Art. 50. See Penal Code.

§109. Consequences of act intended. *Annotated.*

§110, Art. 50 to §114, Art. 51. See Penal Code.

#### §74. Discretion may be proved.

(1.) Proof of the non-age of the accused at the time of the commission of the offense, imposes upon the State the burden of proving that when he committed the offense, if he did commit it, he understood the nature and illegality of the act. This proof is not sufficiently made if the state merely shows that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age. On the contrary, it must be affirmatively shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime.

It is not necessary that the proof of discretion should be made by positive evidence. In many cases circumstances of education, habits, life, general character, moral and religious training, and, oftentimes, the circumstances connected with the offense, will be sufficient to satisfy the jury that the accused had the discretion required to render him responsible for the crime.

One of the exceptions to the general rule that a witness can speak only as to facts, and will not be permitted to express his belief or opinion, is that, when the

issue is as to the sanity of a person, even the non-expert witness may state his opinion and conclusion upon the facts to which he has testified. This rule will comprehend the inquiry as to whether or not, on account of non-age, the accused had sufficient discretion to understand the nature and illegality of the acts constituting the crime charged against him; and the witness, having stated the facts upon which he based his opinion, may state his opinion as to the discretion of the accused. See the opinion on the question. *Carr v. S.*, 24 App. 562.

#### §94. Decisions under the statute.

(1.) The meaning of our statute regulating intoxication as a defense to crime is: 1. Mere intoxication from the recent use of ardent spirits will not, of itself, in any case excuse crime. 2. Mere intoxication will neither mitigate the degree nor the penalty of crime. 3. Temporary insanity produced by such use of ardent spirits is evidence which may be used in all cases in the mitigation of the penalty, and also in murder, for the further purpose of determining the degree. (Willson's Crim. Stats., Sec. 92.) In this case the charge of the trial court on the subject (for which see the opinion) was favorable to the defendant, and his objection to the same will not be heard on appeal. *Clare v. S.*, 26 App. 624.

It has never been held, that we are aware of, that voluntary drunkenness was a perfect defense in cases of homicide. As far as the cases upon the subject have gone is to admit evidence of such drunkenness for the purpose of reducing murder from the first to the second degree—never as a complete defense. In *Colbath v. The State*, 2 Texas Court of Appeals, 391, it is said: "Temporary insanity, produced immediately by intoxication, does not destroy responsibility where the person, sane and responsible, made himself voluntarily intoxicated. While intoxication *per se* is no defense to the fact of guilt, yet, when the question of intent and premeditation is concerned, evidence of it is material for the purpose of determining the precise degree. In all cases where the question is between murder in the first or murder in the second degree, the fact of drunkenness may be proved, to shed light upon the mental status of the offender, and thereby to enable the jury to determine whether or not the killing resulted from a deliberate and premeditated purpose." It is well settled that the mere fact of being drunk will not reduce a homicide from murder to manslaughter; it can only be regarded in determining between the two degrees of murder. [*Farrer v. The State*, 42 T. 265; *Farrell v. The State*, 43 T. 503; *Gaitan v. The State*, 11 T. Ct. App. 544.]

We think, however, without further reference to authorities, that the statute we have quoted very plainly establishes the doctrine in this state that in no case will temporary insanity, produced by the voluntary recent use of ardent spirits, be allowed as a perfect defense; that is, such a defense that will acquit the accused of any offense committed while in such a state of mind. *Houston v. S.* 26 App. 657.

Intoxication, or temporary insanity, produced by the voluntary recent use of ardent spirits, will not excuse crime, nor necessarily mitigate the penalty prescribed by law for the crime. But such state of mind may be proved, and, when proved, may be considered by the jury in mitigation of the maximum prescribed penalty. In a case where the crime charged is murder, such state of mind may be considered by the jury in determining the degree of the offense, and also in mitigation of the penalty of any degree of culpable homicide of which the defendant may be found guilty. A charge upon this subject, conforming substantially to the language of the statute, is, ordinarily, sufficient. Note also that the charge in this case was not excepted to, nor sought to be corrected by a special charge; wherefore, in view of the evidence, it would not in any event, if erroneous, constitute material error—no prejudice to appellant being manifest. *Williams v. S.*, 25 App. 76.

#### §109. Consequences of act intended.

(1.) The Penal Code, article 50, provides that "the intention to commit an offense is presumed whenever the means used are such as would ordinarily result in the commission of the forbidden act;" and it is elementary law that, unless the contrary appears, a man is presumed to intend that which is the necessary, or even the probable, consequence of his act. *High v. S.*, 26 App. 245.

## TITLE 2.—OF OFFENSES AND PUNISHMENTS.

### CH. 1.—DEFINITION AND DIVISION OF OFFENSES.

§115, Art. 52 to §121, Art. 57. See Penal Code.

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### CH. 2.—PUNISHMENTS IN GENERAL.

§122, Art. 58 to §140, Art. 73. See Penal Code.

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## TITLE 3.—OF PRINCIPALS, ACCOMPLICES AND ACCESSORIES.

### CH. 1.—PRINCIPALS.

§141, Art. 74 to §148, Art. 78. See Penal Code.	§149. Presence and participation. <i>Annotated.</i> §150 to §155. See Penal Code.
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#### §149. Presence and participation.

(1.) A principal offender under the law of this state is one who, being present when the offense is actually committed by another, and knowing the unlawful intent of such other, aids by acts or encourages by words the party engaged in the commission of the unlawful act. Would the State, in prosecuting such an aider and abettor as a principal offender, for an offense committed primarily in a foreign country, and consummated in this, be required to show a similar or analogous provision of the law of the foreign country? *Fernandez v. S.*, 25 App. 588.

All persons are principals who are guilty of acting together in the commission of an offense, and this includes not only those who are present at the commission of the offense, but those who, though absent, are doing their part in connection with and in furtherance of the common design.

It is further provided by statute (Penal Code, Art. 76) that "all persons who shall engage in procuring aid, arms or means of any kind to assist the commission of an offense while others are executing the unlawful act, and all persons who endeavor at the time of the commission of the offense to secure the safety or concealment of the offenders, are principals, and may be convicted and punished as such."

It is also a well settled general rule that when several persons conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates, committed in furtherance or in prosecution of the common design for which they combine.

Evidence in this case tends to show that previous to the homicide the accused repeatedly declared his intention to kill the deceased, and that, on the evening of, but before the killing, he went to the house of deceased and told deceased's family to tell him that he and George Nixon, Aaron Nixon and Bill Evans were coming to his house that night to kill him; that about dark on that night the defendant and the said Nixons and the said Evans met at a certain house where they prepared arms and ammunition, and whence they went in the direction of the house of the deceased; that, just before the killing, George Nixon called the deceased from his house to the fence, and, while they were talking at the said



fence, the defendant and said Evans and one Buie, each having a gun, passed and stopped at a point forty yards distant, to which point the defendant called the deceased, and that when the deceased started to that point one or the other of the said parties fired upon and killed the deceased. Buie, testifying for the defense, admitted that he and the defendant passed the house of the deceased on the night of the homicide, and saw several negroes there, but denied that he or defendant stopped at or near the said house and witnessed the killing, or that they spoke to the deceased or any person then at his house. He testified further that he and defendant went to Wagoner's house, six miles distant, without stopping; that he did not hear the fatal shot fired, and was not informed of the homicide until the next morning. *Held*, that the evidence clearly raised the issue of conspiracy, and of the complicity of the defendant as a principal offender, and authorized the charge of the court on that issue, which, conforming to the rules above stated, was correct.

A well established principle of law is that it is the duty of the trial court to charge the jury upon every phase of the case made by the evidence, however feeble and inconclusive the supporting evidence may be. Another is that a defendant charged as a principal in a felony cannot be convicted under such indictment as an accomplice. The testimony in this case presented two defensive theories: 1. That the defendant abandoned the conspiracy to kill the deceased. 2. That, having abandoned the formed design to kill the deceased, his liability for his previous inculpatory acts was only that of an accomplice; or if, not having abandoned the formed design, he was not present and was not acting with his co-conspirators in the commission of the offense, he could be held liable, if at all, only as an accomplice, and if guilty as an accomplice, he could not be convicted under this indictment, which charged him as a principal offender. In refusing requested instructions upon these theories the trial court erred, inasmuch as they arose on the evidence at the trial.

The defense requested the trial court to instruct the jury that "the burden of proof never shifts from the State to the defendant, but is upon the State throughout." *Held*, that the principle thus announced is elementary, and the court erred in refusing the instruction. *Phillips v. S.*, 26 App. 225.

A charge of the court instructed the jury to "find the defendant guilty if he and Homer Smith were acting together fraudulently, and the horses were taken by either of them." *Held*, erroneous. The charge should have been to the effect that, to constitute the defendant a principal in the theft, he must have taken the horses himself, or must have acted together with Homer Smith in committing the theft, knowing at the time the fraudulent intent of said Smith, and, if not present with Smith at the time of the commission of the theft by said Smith, must have been acting with him at the very time of the commission of said theft in pursuance of a common design existing between them to commit the theft. *Gentry v. S.*, 24 App. 478.

## CH. 2.—ACCOMPLICES.

§156, Art 79. Accomplice, who is. See §158, Art. 80 to §166, Art. 85. See Penal Code.

§157. Distinction between principal and accomplice. *Annotated.*

### §157. Distinction between principal and accomplice.

(1.) See the opinion *in extenso* for the charging part of an indictment *held* to comprehend but a single count, and to be sufficient to charge the accused as an accomplice to murder. *Crook v. S.*, 27 App. 198.

The second count of the indictment (being the count upon which this conviction was had) charges that certain persons, to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder one Ellick Brown, and that defendant, prior to the commission of said murder by said unknown persons, did unlawfully, willfully and of his malice aforethought, advise, command and encourage said unknown persons to commit said murder, said defendant not being present at the commission of said murder by said unknown

persons. It was objected to the indictment that it neither named nor gave a description of the unknown persons who committed the murder of Brown. *Held*, that the objection is not sound, and the indictment is sufficient, its purpose and effect not being to charge the unknown persons as the "accused" in this case, but to charge the defendant as an accomplice to the murder of Brown.

The charge of the court in this case should, more explicitly than it did, have instructed the jury that, to convict, they must find that the defendant was not present at the commission of the murder, and that the murder was committed by a person or persons who had been advised, commanded or encouraged by the defendant to commit it.

See the statement of the case for evidence *held* insufficient to support a conviction as an accomplice to murder. *Dugger v. S.*, 27 App. 95.

To inculcate an accused as a principal offender in theft, the state must show that he had some connection with or complicity in the taking of the property. It does not suffice to prove that, subsequent to the taking and without complicity therein, but with knowledge that the property had been stolen, he aided the taker to dispose of it, or fraudulently disposed of it himself. See the opinion for a summary of proof which demanded of the trial court in harmony with this rule. *Buchanan v. S.*, 26 App. 52.

While not essential, it was proper that the charge of the court should instruct the jury as to the forms of the verdict they could return in this case. The form of the verdict, in the event of conviction, as prescribed by the charge in this case, was as follows: "We, the jury, find the defendant, Mack Crook, guilty as an accomplice to murder of the first degree in the killing and murdering of James H. Black, as charged in the indictment," etc. *Held*, correct. *Crook v. S.*, 27 App. 198.

### CH. 3—ACCESSORIES.

§167, Art. 86. See Penal Code.

§167a. Accessory defined. *Annotated*.  
 §168, Art. 87 and §169, Art. 88. See  
 Penal Code.

§170. Indictment. *Annotated*.

§170a. See Penal Code.

#### §167a. Accessory defined.

(1.) "An accessory is one who knowing that an offense has been committed conceals the offender or gives him any other aid in order that he may evade an arrest, or trial, or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escape, shall be considered an accessory." It is not essential under this definition that the aid rendered to the criminal shall be of a character to enable the criminal to effect his personal escape or concealment, but it is sufficient if it enables him to elude present arrest and prosecution. The facts upon which the indictment in this case was based were that immediately after the commission of the homicide by the principal he and the defendant had a retired private consultation, after which the principal mounted a horse and disappeared, and the defendant charged the only two other witnesses present to testify on the inquest to a statement fabricated by himself, to the end that, upon final trial, the principal might be acquitted or released on nominal bond. *Held*, that such facts would constitute the defendant an accessory within the purview of the statute. *Blakely v. S.*, 24 App. 616.

See the opinion for an indictment *held* sufficient to charge the accused as an accessory to murder, as accessory is defined by article 86 of the Penal Code. *Blakely v. S.*, 24 App. 616.

### CH. 4.—TRIAL OF ACCOMPLICES AND ACCESSORIES.

§171, Art. 89 to §171h, Art. 91. See Penal Code.

## TITLE 4.—OF OFFENSES AGAINST THE STATE, ITS TERRITORY, PROPERTY AND REVENUE.

### CH. 1.—TREASON.

§172, Art. 92 and §172a, Art. 93. See Penal Code.

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### CH. 2.—MISPRISION OF TREASON.

§173, Art. 94 and §173a, Art. 95. See Penal Code.

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### CH. 3.—MISAPPLICATION OF PUBLIC MONEY.

§174, Art. 96 to §181, Art. 102. See Penal Code.	§183, Art. 104 to §185a, Art. 104b. See Penal Code.
§182, Art. 103. Misapplication of coun- ty or city funds. <i>Annotated.</i>	

#### §182. Misapplication of county or city funds.

(1.) Indictment to charge the misapplication of county or city funds, as that offense is defined by article 103 of the Penal Code, must allege the ownership of the funds in the county, city, or town, as the case may be. This indictment failing to allege the ownership of the funds, is insufficient to charge the offense, wherefore the prosecution is dismissed. *Crane v. S.*, 26 App. 482.

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### CH. 4.—OF ILLEGAL CONTRACTS AFFECTING THE STATE

§186, Art. 105. See Penal Code.

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### CH. 5.—COLLECTION OF TAXES AND OTHER PUBLIC MONEY.

§187, Art. 106 to §191, Art. 109. See Penal Code.	§193, Art. 111 to §203d, Art. 114c. See Penal Code.
§192, Art. 110. Pursuing taxable occu- pation without license. <i>Anno- tated.</i>	

#### §192. Pursuing taxable occupation without license.

(1.) The Legislature of this state has the power to absolutely prohibit drinking saloons, or saloons to be used in the pursuit of the liquor traffic. This power carries with it the power to regulate the mode and manner, and the circumstances under which such saloons may be conducted, and to surround the right with such conditions, restrictions and limitations as it may deem proper. Under this rule the act of the Legislature requiring the execution of a bond as a condition precedent to the granting of a license to conduct a drinking saloon is constitutional. See the opinion on the question.

Relator was charged with the offense of pursuing the occupation of a retail liquor dealer without having complied with the license laws. The application for the writ of *habeas corpus* alleges the refusal of the relator to execute the bond required by law, and prays for relief upon the ground that the conditions of the bond are unconstitutional. *Held*, that the conditions of the bond cannot be inquired into in a proceeding of this character, the bond never having been executed; and that the constitutionality of the conditions can be impeached only in a proceeding to enforce the penalties for their infraction. *Ex parte Bell*, 24 App. 428.

(2.) Under the acts of March 11th, 1881, and April 4th, 1881 [Sayles' Civ. Stat., Art. 3226a], the appellant was prosecuted for pursuing the occupation of selling liquors in quantities less than a quart, without paying the tax required by law and without license, etc. He excepted to the indictment on the ground that the said acts of 1881 are violative of the Constitution of the state in two respects: *first*, because they contain more than one subject, and embrace subjects not expressed in their titles; and, *second*, because, as a condition precedent to engaging in such business, the said acts require the tax thereon to be paid in advance for the term of a year, but permit the tax on other occupations to be paid quarterly, and require a license to pursue said business, but permit others to be pursued without a license, and, therefore, are repugnant to the constitutional requirement of equality and uniformity in taxation. But, *held*, that neither of these objections to the said acts of 1881 is tenable, nor are the said acts repugnant to the fourteenth amendment of the Constitution of the United States. See the opinion *in extenso* for a lucid exposition of the principles and precedents which maintain the constitutionality of the said enactments. *Fahey v. S.*, 27 App. 146.

(3.) The offense denounced by this article is the pursuing of a taxable occupation, calling or profession without first having paid the occupation tax levied on such avocation. The trial court charged the jury in this case as follows: "You are charged that different sales at different times, to different persons, would constitute the occupation of selling, but one sale would not." *Held*, erroneous, as announcing an incorrect proposition of law, and as being upon the weight of evidence, it being the exclusive province of the jury to determine the question. *McReynolds v. S.*, 28 App. 372.

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## CH. 6.—DEALING IN FRAUDULENT LAND CERTIFICATES.

§204, Art. 115 to §206, Art. 117. See Penal Code.

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## CH. 7.—DEALING IN PUBLIC LANDS BY OFFICERS.

§207, Art. 118, and §208, Art. 119. See Penal Code.

T. 5, CHS. 1, 2.] OFFENSES AFFECTING DEPARTMENTS. § 213a, 242a.

## TITLE 5.—OFFENSES AFFECTING THE EXECUTIVE, LEGISLATIVE AND JUDICIAL DEPARTMENTS OF THE GOVERNMENT.

### CH. 1.—BRIBERY.

§209, Art. 120 to §214, Art. 121. See Penal Code.	§215, Art. 122 to §237, Art. 140. See Penal Code.
§213a. Illegality of arrest not a defense of an officer accepting a bribe to release prisoner. <i>Annotated.</i>	

§213a. Illegality of arrest not a defense.

(1.) A peace officer who is prosecuted for accepting a bribe to release a prisoner cannot impeach the legality of the arrest as a defense. *Moseley v. S.*, 24 App. 515.

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### CH. 2.—DRUNKENNESS IN OFFICE.

§238, Art. 141 to §242, Art. 144a. See Penal Code.	§242a. Public place, defined. <i>Anno-</i> <i>tated.</i>
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§242a. Public place defined.

(1.) This term does not mean a place which, in point of fact, is public, as distinguished from private, a place that is visited by many persons, and that is usually accessible to the public. A grand jury room, during the session of the grand jury is a public place. *Murchison v. S.*, 24 App. 8.

T. 6, CHS. 1-4.] OFFENSES AFFECTING SUFFRAGE. §§263, 265a.

## TITLE 6.—OF OFFENSES AFFECTING THE RIGHTS OF SUFFRAGE.

### CH. 1.—BRIBERY AND UNDUE INFLUENCE.

§243, Art. 145 to §248, Art. 150. See Penal Code.

### CH. 2.—OFFENSES BY JUDGES AND OTHER OFFICERS OF ELECTION.

§249, Art. 151 to §257, Art. 158. See Penal Code.

### CH. 3.—RIOTS AND UNLAWFUL ASSEMBLIES AT ELECTIONS, AND VIOLENCE USED OR MENACED TOWARDS ELECTORS.

§258, Art. 159 to §261, Art. 162. See Penal Code.	§263. Decisions under preceding article. <i>Annotated.</i>
§262, Art. 163. Carrying arms about election. See Penal Code.	

#### §263. Decisions under preceding articles.

(1.) Article 163 defines the offense of carrying arms about elections. Art. 320, *post*, defines the offense of carrying arms in church or other assembly. These two offenses are distinct, comprehending different elements and punished by different penalties, although one of the ingredients of each is common to both. These acts are, therefore, not within the rule that if the inculpatory acts enumerated in two different articles of the Penal Code be the same, and the penalties prescribed be different, neither will be enforceable, because of uncertainty as to the penalty. *Cooper v. S.*, 25 App. 530; *Cooper v. S.*, 26 App. 575.

To a prosecution for carrying arms about an election, etc., as that offense is defined by this article, the accused interposed the defense that the election was void because illegal. But *held, first*: Primarily, the presumption obtains in favor of the legality of the election. *Second*: Even if the legality of the election can be assailed collaterally, the burden of establishing the illegality of the same rests on the accused. *Third*: In a prosecution for the violation of said article 163, it is immaterial whether the election was legal or illegal, if the same was held under the forms of law. *Cooper v. S.*, 26 App. 575.

### CH. 4.—MISCELLANEOUS OFFENSES AFFECTING THE RIGHT OF SUFFRAGE.

§264, Art. 164. See Penal Code.	§265a. Decisions on the foregoing article. <i>Annotated.</i>
§265, Art. 165. Illegal voting. See Penal Code.	
§266, Art. 166 to §282, Art. 179. See Penal Code.	

#### §265a. Illegal voting.

(1.) Upon principle, every person is presumed to know the law, both as to civil and criminal transactions. Moreover, the rule is statutory in this state that ignorance of the law is no excuse for the violation of a law, and that no mistake of law will excuse one committing an offense. Upon a trial for illegal voting the

T. 7, CHS. 1, 2.] OFFENSES AFFECTING RELIGIOUS OPINION. §290a.

court instructed the jury, in substance, that if the accused, when he voted, had been convicted of an assault to murder, and knew at the time he so voted that he had been so convicted, such knowledge was equivalent to knowing that he was not a qualified voter. *Held*, correct.

It was further *held* in this case that, if the accused knew that he had been convicted of an assault to murder, he would be presumed to know that such an offense was a felony, and that one of the consequences of such conviction was his disqualification to vote. As he could not be heard to deny such knowledge, it was not an issue to be proved. *Thompson v. S.*, 26 App. 94.

## TITLE 7.—OF OFFENSES WHICH AFFECT THE FREE EXERCISE OF RELIGIOUS OPINION.

### CH. 1.—DISTURBANCE OF RELIGIOUS WORSHIP.

§283, Art. 180 to §287, Art. 182. See Penal Code.

### CH. 2.—SUNDAY LAWS.

§§288, 289, Art. 183. See Penal Code.

§290, Art. 184. Not applicable, when. See Penal Code.

§290a. Work of necessity defined. *Annotated*.

§291, Art. 185. Horse racing, gaming, etc., on Sunday. See Penal Code.

§291a. Decisions on Art. 185. *Annotated*.

§292, Art. 186 to §295, Art. 187. See Penal Code.

§296. Decisions under these laws. *Annotated*.

§290a. Work of necessity defined.

(1.) The defendant was convicted of the offense of "laboring" on Sunday in an ice factory. It appeared from the evidence that if the factory was closed from Saturday 12 o'clock P. M. to Sunday 12 o'clock P. M., it would require from twenty-four to thirty hours to reduce the temperature so that ice could be drawn, and the ice would become spongy and unsaleable.

Do these facts present a case of necessity? What is meant by the works of necessity? Under very similar statutes to the one under which this prosecution is had, we find this definition: By the word "necessity" we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of any particular case may be deemed "necessity" within the statute. [*Flagg v. Inhabitants of Millbury*, 4 Cush. 243; *Comm. v. Knox*, 6 Mass. 76; *Pearce v. Atwood*, 13 Mass. 354.]

Nor will it do to limit the word "necessity" to those cases of danger to life, health or property, which are beyond human foresight to control. On the contrary, the necessity may grow out of, or indeed be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the act. For it is no part of the design of the act to destroy or impose onerous restrictions upon any lawful trade or business; and hence, under a similar statute, it has been held in a sister state that it is lawful to keep a blast fireman at work on Sunday, because it is a work of necessity. So, too, it has been held that under special circum-

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stances a mill may grind on that day, and I think it will hardly be questioned that a gas company may supply gas, and a water company water, and a dairyman milk to their respective customers on that day. [McGatrick v. Wason, 4 Ohio State, 560, per Thurman, C. J.]

In line with these principles it is held that such labor on Sunday as is a *necessary* incident to the accomplishment of a lawful purpose, such as the manufacture of malt beer, is not a violation of the statute. [Crockett v. The State, 33 Indiana, 416; Morris v. The State, 31 Indiana, 189.]

Applying the principles of these cases to this, it is evident that the labor in operating an ice factory is a "work of necessity," and comes within the exception. *Hennersdorf v. S.*, 25 App. 597.

The shoeing of stage horses on Sunday is within the exception. *Nelson v. S.*, 25 App. 599.

**§291. Gaming on Sunday.**

(1.) The indictment must allege the name of the person or persons with whom the accused engaged in the game. *Shook v. S.*, 25 App. 345.

**§296. Decisions under these laws.**

(1.) Article 186, *ante*, which denounces a penalty against a merchant, etc., who shall sell or barter on Sunday, is constitutional. *Ex parte Gus Sundstrom*, 25 App. 183.



# TITLE 8.—OF OFFENSES AGAINST PUBLIC JUSTICE.

## CH. 1.—OF PERJURY.

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| <p>§297, Art. 188 to §299, Art. 189. See Penal Code.<br/>         §300, Art. 190. Oath must be legally administered. See Penal Code.<br/>         §301. Decisions under preceding article. <i>Annotated.</i><br/>         §302, Art. 191, §303, Art. 192. See Penal Code.<br/>         §304. Instances. <i>Annotated.</i></p> | <p>§305, Art. 193. Immaterial statement not perjury. See Penal Code.<br/>         §§306, 307. See Penal Code.<br/>         §308. Indictment, requisites of. <i>Annotated.</i><br/>         §309. Evidence. <i>Annotated.</i><br/>         §§310, 311. See Penal Code.<br/>         §312. Charge of court. <i>Annotated.</i><br/>         §313, Art. 194 and §314, Art. 195. See Penal Code.</p> |
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### §301. Decisions under preceding article.

(1.) Testimony delivered before the grand jury is testimony delivered "under circumstances in which an oath is required by law," and a false statement made by a witness in his testimony before the grand jury may be assigned and prosecuted as perjury.

A false statement made under oath, in the course of a proceeding in which an oath is required by law, whether the person is admitted to testify legally or otherwise, or whether he testifies voluntarily or otherwise, is perjury. An exception to this rule is when a person has been forced to testify to facts which would tend to inculpate himself in a crime. If such facts exist, and do not appear upon the face of an indictment, it devolves upon the accused to establish them by proof. See the statement of the case for an indictment *held* sufficient to charge perjury. *Pipes v. S.*, 26 App. 318.

The perjury assigned in this case was alleged to have been committed on the trial of one Coy for the murder of one Jackson in Wilson county. Soon after the killing of Jackson, Coy killed one Elder, in Karnes county, and fled to Mexico, whence he was extradited for the murder of Elder, but not for the murder of Jackson. Coy was then indicted and put upon trial in Wilson county for the murder of Jackson, which trial resulted in a mistrial. No objection nor plea to the jurisdiction of the District Court of Wilson county was interposed upon the trial for the murder of Jackson, but, soon after the mistrial, Coy sought his discharge by the writ of *habeas corpus* upon the ground that, not having been extradited for the murder of Jackson, he was illegally restrained of his liberty upon the charge of the murder of Jackson. Upon the hearing of the writ it was adjudged that the District Court of Wilson county had no jurisdiction to try him for the Jackson murder, and he was discharged from restraint under that charge. The contention in this case is that the District Court of Wilson county, having no jurisdiction to try Coy for the murder of Jackson, the accused did not, and could not, commit legal perjury on that trial. *Held*: 1. The District Court of Wilson county had jurisdiction of the subject matter of the prosecution—murder—against Coy. 2. It did not have jurisdiction over Coy's person to try him for the murder of Jackson, because he was not extradited for that particular murder. 3. Jurisdiction over the person is a matter subject to the objection or waiver only of the person over whom it is being, or is sought to be, exercised. 4. If such person submits to the jurisdiction of the court over his person, and to trial, without objection, he waives his privilege, whatever it may be, and the proceedings of the court trying him, at the most, are merely voidable, and voidable only at his instance, and cannot be questioned by any other person. 5. The trial of Coy for the murder of Jackson was a legal proceeding, and the court trying him was a court of competent jurisdiction for the purposes of this case. Wherefore the contention of the defense is not tenable. *Cordway v. S.*, 25 App. 405.

### §304. Instances.

(1.) Under the rule of the common law, and under the statutory law of many of the states of the Federal Union, a false statement under oath, made in the progress of a judicial proceeding, cannot be assigned as perjury, unless the tribunal sitting in judgment upon the proceeding not only had jurisdiction of the matter, but

when its jurisdiction had actually attached. But, under the Constitution and the statutory laws of this state, the rule is more comprehensive, and a false statement may be assigned for perjury if it was made in the course of a judicial proceeding before a court of competent jurisdiction over the subject matter of the proceeding, although its jurisdiction had not actually attached. See the opinions, both on the original hearing and on the motion for rehearing, for an elaborate discussion of the principles underlying the rule.

The perjury assigned in this case was the alleged false testimony given by the accused upon the trial, in a justice's court, of one Green Wright, upon a charge of carrying a pistol. The prosecution against Wright was based upon a complaint and information, the former of which is required by law to be verified by the oath of some credible person. Evidence was introduced upon this trial which tended strongly to show that the complaint under which the prosecution of Wright was had was not sworn to; and upon the theory that, if the complaint was not sworn to, the jurisdiction of the justice of the peace had not attached in the Wright case, a false statement by accused in that proceeding was not assignable as perjury, the accused asked the trial court to charge the jury that, if they had a reasonable doubt that the complaint was sworn to, they should acquit. *Held*, that under the rule first announced the trial court did not err in refusing the special charge. *Anderson v. S.*, 24 App. 705.

### §308. Indictment, requisites of.

(1.) It is essential in a perjury case not only that the indictment shall allege that the court before which the judicial proceeding in which the perjury is charged to have been committed had jurisdiction of such judicial proceeding, but that fact must be established by the proof.

Under the law of this state, an information is insufficient for any purpose, unless founded upon a complaint, filed therewith, charging an offense. The indictment in this case charged that the perjury was committed on the trial of a judicial proceeding in the county court, "wherein one Bean was duly and legally charged by information," etc. To support the allegation of jurisdiction of the county court, the State introduced in evidence the information, but not the complaint. *Held*, that the proof was insufficient. *Wilson v. S.*, 27 App. 47; *Smith v. S.*, 27 App. 50.

An indictment which conforms to No. 122 of Willson's Criminal Forms is sufficient to charge the offense of perjury. *Smith v. S.*, 27 App. 50.

If it specifically charges the materiality of the matter assigned for perjury, such allegation, in an indictment for perjury, is sufficient in this respect, notwithstanding it does not literally follow the approved form. [See the statement of the case for the charging part of an indictment for perjury which, substantially conforming to number 122 of Willson's Criminal Forms, is *held* sufficient.] *Kitchen v. S.*, 26 App. 165.

### §309. Evidence.

(1.) The indictment charges that the perjury was committed upon the trial of M. and J., for the murder of J. J. The State introduced in evidence a separate judgment rendered against J., to which the defense objected upon the ground that it did not appear from that judgment that M. and J. were jointly tried, but that J. was tried alone. As matter of fact, M. and J. were jointly placed upon trial, and when the State closed its evidence the court directed the acquittal of J., and the trial of M. was proceeded with, the consequence being the return of two verdicts and the rendition of two judgments in the case. The statement of defendant, assigned as perjury, was made during the progress of the joint trial. *Held*, that the judgment against J. was properly admitted in evidence.

The State introduced in evidence, over objection of the defendant, an indictment charging him with the murder of J. J.—the offense involved in the trial upon which the perjury is alleged to have been committed—and adduced oral proof that M., one of the defendants in the said trial, was a witness against him. *Held*, that the evidence was competent to show motive. *Kitchen v. S.*, 26 App. 165.

In a prosecution for perjury committed upon the trial of C. for burglary, the State was properly permitted to prove the testimony of the accused before the grand jury upon the investigation of the charge against C., and his subsequent contradictory evidence on the trial of C., and his statements respecting the inducements under which he testified as he did on the trial. *Littlefield v. S.*, 24 App. 167.

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It was not error to permit the State in a trial for perjury to read in evidence the complaint filed in the cause upon the trial of which the perjury was alleged to have been committed. Inasmuch as such evidence was competent to prove that the alleged false statements were made in the judicial proceeding, and before the court alleged in the indictment, but, having admitted such evidence, the trial court, in its charge, should have limited its effect to such purpose only. *Higgenbotham v. S.*, 24 App. 505.

**§312. Charge of the court.**

(1.) It was not essential that the trial court should have charged the jury that the statement assigned as perjury must relate to a past or present event, inasmuch as the indictment itself shows that the statement did relate to a past event.

The record of the proceedings upon the trial in which the perjury was alleged to have been committed, was properly admitted in evidence as matter of inducement, and to support the allegation in the indictment that the perjury was committed upon the said trial. But it devolved upon the trial court to so limit the purpose of said evidence in its charge, and to instruct the jury that the record could not be considered upon the issue of perjury.

On a trial for perjury, the trial court instructed the jury, in effect, to acquit the defendant if they had a reasonable doubt whether the statement made by him, and assigned as perjury, was true or false. *Held*, that, as the error was in the defendant's favor, he cannot be heard to complain. *Kitchen v. S.*, 26 App. 169.

To charge the jury, in felony cases, upon the law applicable to the case, whether asked or not, is under our law a duty imposed imperatively upon the trial judge. It is an express provision of our statute that "in trials for perjury no person shall be convicted, except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statements under oath, or upon his own confession in open court." The trial being upon the plea of not guilty, and not upon confession in open court, the omission of the trial court to give in charge to the jury the substance of the above statutory provisions was fundamental error. *Wilson v. S.*, 27 App. 47; *Smith v. S.*, 27 App. 50.

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**CH. 2.—OF FALSE SWEARING.**

§315, Art. 196 to §319a, Art 198a. See Penal Code.

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**CH. 3.—OF SUBORNATION OF PERJURY AND FALSE SWEARING.**

§320, Art. 199 and §321, Art. 200. See Penal Code.

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**CH. 4.—OFFENSES RELATING TO THE ARREST AND CUSTODY OF PRISONERS.**

§322, Art. 201 to §341, Art. 212. See Penal Code.	§357, Art. 226. Jail defined.
§341a. Indictment. <i>Annotated</i> .	§357a. Decision on preceding article. <i>Annotated</i> .
§342, Art. 213 to §356, Art. 225. See Penal Code.	§358, Art. 227 to §360, Art. 229. See Penal Code.

**§341a. Indictment.**

(1.) An indictment conforming to No. 138 of Willson's Criminal Forms is sufficient. *Williams v. S.*, 24 App. 17.

**§357a. Jail defined.**

(1.) A jail, as defined by article 226 of the Penal Code, is any place of confinement used for detaining a prisoner. This definition will include the space

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between the jail-house proper and the wall surrounding it, if the wall is used as a means for the safe keeping of the prisoners; and whether or not such wall is a part of the jail, is a question to be determined by the jury under proper instruction of the court. *Welch v. S.*, 25 App. 580.

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CH. 5.—FALSE CERTIFICATE, AUTHENTICATION OR ENTRY BY AN OFFICER.

§361, Art. 230 to §371, Art. 239. See Penal Code.

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CH. 6.—MISCELLANEOUS PROVISIONS.

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| §372, Art. 240 to §382, Art. 249. See Penal Code.   | §390, Art. 257 to §393, Art. 258. See Penal Code.  |
| §383, Art. 250. County or city officers becoming interested in contracts. See Penal Code.           | §393a, Art. 258a. Treasurer of county or city failing to report disbursement of school fund. <i>New.</i> |
| §383a. Decisions on the preceding article. <i>Annotated.</i>  | §394, Art. 259 to §406, Art. 269. See Penal Code.  |
| §384, Art. 251 to §389, Art. 256. See Penal Code.   | §406a, Art. 269a. Surveyor failing to survey mining claim, etc. <i>New.</i>                              |
| §389a, Art. 256a. Officer failing to report statistics, etc. <i>New.</i>                            | §407, Art. 270 to §418, Art. 278a. See Penal Code.   |
| §389b, Art. 256b. Officer failing to report, etc., as to school fund or school affairs. <i>New.</i> |  |

§383a. Construction of article 250.

(1.) In the construction of a statute, the legislative intent, if that intent can be ascertained, must govern even over the literal import of words, and without regard to grammatical rules. Thus construed, article 250 of the Penal Code inhibits any officer of a county, city or town from entering into, on account of himself, any kind of financial transaction with such corporation. The indictment in this case charged the accused with the violation of said article, in that he sold a mule to the county of which he was a county commissioner. *Held*, that such sale constituted a violation of said article, and the indictment was sufficient. *Rigby v. S.*, 27 App. 55.

§389a—Art. 256a.—Officer failing to report statistics, etc.

If any state or county officer shall fail or refuse to give such data, statistics, and information as herein provided, such state or county officer shall be guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than twenty-five nor more than one hundred dollars. [Act April 2, 1889; 21 Leg. p. 23.]

§389b—Art. 256b.—Officer failing to report, etc., as to school fund or school affairs.

The state superintendent shall require of county judges, county, city, and town superintendents, county and city treasurers, and treasurers of school boards, and other school officers and teachers, such school reports relating to the school fund and other school affairs as he may deem proper for collecting information and advancing

(†) See Civil Stat., Art. 4544. 483

the interests of the public schools, and shall furnish to county, city, and town superintendents, and other school officers and teachers, for the use of such officers and teachers, the necessary blanks and forms for making such reports and carrying out such instructions as may be required of them; and any county judge, or county, city, or town superintendent, assessor, treasurer, or teacher who shall fail to make such report within twenty days after the same shall have been required by the state superintendent to be filed, shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined in any sum not less than twenty-five dollars or more than five hundred dollars, the same to be paid, when collected, to the available school fund. [Act April 8; July 6, 1889; 21 Leg. p. 15.]

**§393a—Art. 258a.—Treasurer of county or city failing to report disbursement of school fund.**

It shall be the duty of the county treasurer of each county and the city treasurer, or treasurer of the school board of each city or town having exclusive control of its schools, to report the disbursement of the school fund, state and county, to the commissioners' court of his county. Said report shall be made at the first regular term of the commissioners' court after the thirty-first of August of each year, or the end of the school year, and shall consist of a complete exhibit of all moneys received and paid out by him, to whom paid, upon what voucher, and what moneys, if any, remain in his hands.

When such report shall have been examined and approved by the commissioners' court it shall be the duty of the county treasurer to immediately transmit a copy of such report, including a statement of the status of the permanent county school fund, certified to by the county clerk, to the superintendent of public instruction at Austin.

Any county or city treasurer failing to make and transmit said report and certified copy, or either, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than five hundred dollars. [Act May 15; August 14, 1888, §§1, 2 & 3; 20 Leg. S. S. p. 6.]

**§406a—Art. 269a.—Surveyor failing to survey a mining claim, etc.**

(1.) The locators of any mining claim shall post up, at the center of one of the end lines of the same, a written notice, stating the name of the locator and of the claim, and the date of posting, and describe the claim by giving the number of feet in length and width, and the direction the claim lies in length from the notice, together with the section if known, and the county; and shall place stone monuments at the four corners, and otherwise describe corners, so that they can be readily found. The notice shall be placed in a conspicuous place so as to be readily seen.

(2.) The locators shall, within three months after the date of posting the required notice, sink a shaft at least ten feet in depth by four feet square, or a tunnel of the same dimensions, ten feet in length, or an open cross-cut twenty feet in length, four feet or more wide and ten feet in depth at its shallowest part, and shall within said time file with the county surveyor, or the district surveyor of the county, as the case may be, an application in writing for the survey of their claim, which application shall be accompanied with a fee of twenty dollars, unless its tender is waived, and also with an affidavit attached thereto that the required work, signifying it, has been done, and that the locators have found valuable mineral on the claim; and the affidavit shall state the date of the first posting of the notice on the claim by the applicants; and further, that the notice has not been post-dated or changed in its date. Upon receiving said application and fee the surveyor shall record the application together with the affidavit, and he shall thereupon forthwith proceed to survey said claim and forward the field-notes to the commissioner of the general land office within thirty days after filing the application, in default of which he shall pay the aggrieved party such damages as he may sustain, and in addition thereto shall be deemed guilty of a misdemeanor, and on conviction fined not less than twenty dollars nor more than one hundred dollars; and it shall be the duty of the applicants to see that the field-notes are so returned. The fee of twenty dollars shall cover all the services provided for in this section. In all other cases enumerated in this act the fee shall be the same allowed county clerks for similar services. [Act March 29; July 6, 1889, §§5 and 6; 21 Leg. p. 116.]

## TITLE 9.—OF OFFENSES AGAINST THE PUBLIC PEACE.

### CH. 1.—UNLAWFUL ASSEMBLIES.

§419, Art. 279 to §434, Art. 294. See Penal Code.

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### CH. 2.—RIOTS.

§435, Art. 295 to §452, Art. 312. See Penal Code.

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### CH. 3.—AFFRAYS AND DISTURBANCES OF THE PEACE.

§453, Art. 313 to §455, Art. 314. See Penal Code. | §457, Art. 315 to §459, Art. 317. See Penal Code.

§456. Province of the jury. *Annotated.*

#### §456. Province of the jury.

(1.) Persons residing in residences which abut upon a public street are inhabitants of such street within the meaning of article 314 of the Penal Code. Evidence, therefore, was admissible to prove that there were inhabited residences abutting upon the street and adjacent to the locality at which the disturbance occurred. Whether the defendant's conduct was calculated to disturb the inhabitants of the street was for the jury alone to determine. *Keller v. S.*, 25 App. 325.

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### CH. 4.—UNLAWFULLY CARRYING ARMS

§460, Art. 318. Unlawfully carrying arms. *Amendment.* | §465. See Penal Code.  
§461 to 463, Art. 319. See Penal Code. | §466. Officers, etc.; exception as to. *Annotated.*  
§464. Acts not in violation of the law. | §467. Art. 319 to §482, Art. 323. See Penal Code.

#### §460—Art. 318.—Unlawfully carrying arms.

If any person in this state shall carry on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, or knuckles made of any metal or any hard substance, bowie-knife, or any other knife manufactured or sold for purposes of offense or defense, he shall be punished by fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days, or both by such fine and imprisonment; and during the time of such imprisonment such offender may be put to work upon any public work in the county in which said offense is committed. [Amendment January 30; July 6, 1889; 21 Leg. p. 33.]

#### §464. Acts not in violation of the law.

(1.) A conviction for unlawfully carrying a pistol cannot be sustained upon proof that when the pistol was found on the person of the accused, he was at his usual place of business.

Nor can such a conviction be sustained upon proof which shows that, when the pistol was carried, the accused had reasonable ground for fearing an unlawful attack upon his person, and that the danger was imminent and of such a character as not to admit of the arrest of the party about to make such attack. The actual presence of the threatening party at the time that the pistol was carried by accused, was not essential to bring the accused within the exception to the statute. *Short v. S.*, 25 App. 379.

Intent is an essential element to constitute the offense of unlawfully carrying a pistol on the person; and in all cases wherein the *intent* is an element of the offense charged, it is competent for the accused to prove his general reputation, etc. The rejection of such proof by the trial court in this case was material error. *Lann v. S.*, 25 App. 495.

**§466. Officers, etc.; exception as to.**

(1.) A soldier of the United States army is not amenable to the statutes of the state prohibiting the carrying of a pistol on the person if, at the time he carries the pistol on his person, he is in the *actual* discharge of his duties as a soldier. The rule is otherwise if, at the time he carries the pistol on his person, he is not in the *actual* discharge of his military duties. *Lann v. S.*, 25 App. 495.

Article 319 of the Penal Code does not specifically except a penitentiary guard from the operation of article 318, defining the offense of unlawfully carrying arms, but such a guard is a "civil officer" within the meaning of the first named article, and will be held exempt from the operation of article 318 "when engaged in the discharge of his official duties." In this case—a trial for carrying a pistol—the trial court charged that a penitentiary guard would be exempt from the operation of said article 318, while in the lawful discharge of his duty, or while on the premises of the penitentiary, or while going to and returning from a place for the necessary purpose of obtaining ammunition, but that he would not be exempt if he carried the pistol under other circumstances or for other purposes. *Held*, correct. *West v. S.*, 26 App. 99.

The statute (Sayles' Annotated Stats., Art. 4520), which empowers sheriffs to appoint, in writing, deputy sheriffs for their respective counties, requires that such deputy sheriffs, before entering upon the discharge of their official duties, shall take and subscribe the constitutional oath of office, which shall be indorsed on the appointment, together with the certificate of the officer who administers the oath, and such appointment and oath shall be recorded in the county clerk's office and deposited therein. To a prosecution in K. county, for carrying a pistol in said county, the accused in this case introduced as evidence of his exemption from the law prohibiting the carrying of a pistol, a paper executed in V. county on April 3, 1887, signed by the sheriff of V. county, appointing him a deputy sheriff of said V. county. Neither the constitutional oath of office nor the certificate required by the statute was indorsed upon the said paper. Other proof showed that the accused left V. county and moved to K. county, and was a resident of K. county at the time of the alleged offense, and, further, that the said appointment had never been recorded in the office of the county clerk of V. county. *Held*, that the purported appointment was illegal and of no effect, and did not operate as an exemption of the accused.

The trial court properly instructed the jury, by request of the State, to the effect that the accused in this case was not a legally appointed deputy sheriff; and that, if the State had proved the carrying of the pistol by the accused, it devolved upon the accused to show his authority, or the facts upon which he could reasonably infer authority to carry it. And it correctly instructed the jury, by request of the defense, that, although not a legally appointed deputy sheriff, if such was the fact, yet if the accused honestly believed that he was so legally appointed, and with that belief carried the pistol, he should be acquitted. *Blair v. S.*, 26 App. 387.



T. 10, CHS. 1-4.] OFFENSES AGAINST PUBLIC MORALS. §§518-532.

## TITLE 10—OFFENSES AGAINST PUBLIC MORALS, DECENCY AND CHASTITY.

### CH. 1.—UNLAWFUL MARRIAGES.

§488, Art. 324 to §499, Art. 328. See Penal Code.

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### CH. 2.—INCEST.

§500, Art. 329 to §512, Art. 332. See Penal Code.

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### CH. 3.—OF ADULTERY AND FORNICATION.

§518, Art. 333 to §517, Art. 334. See Penal Code.	§526, Art. 337. Fornication defined. See Penal Code.
§518. Evidence. <i>Annotated</i> .	§527. See Penal Code.
§519 to §525, Art. 336. See Penal Code.	§528. Evidence. <i>Annotated</i> .
	§529 to §531, Art. 338. See Penal Code.

#### §518. Evidence.

(1.) It must be shown affirmatively that one of the parties to adulterous acts was married at the time of the adulterous acts. The fact of marriage cannot be proven by the opinion of the witness. *Webb v. S.*, 24 App. 164.

#### §528. Evidence.

(1.) As a general rule it is not competent in a prosecution for fornication, for the State to prove that the female defendant has the reputation of being a prostitute. But, in view of the confessions of the accused in this case, which established that the female defendant was a prostitute, the admission of the incompetent proof of reputation cannot be held material error. *Perigo et al. v. S.*, 26 App. 533.

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### CH. 4.—DISORDERLY HOUSES.

§532, Art. 339. Disorderly house defined. <i>Amendment</i> .	§541a, Art. 341a. Employment of lewd women an offense; punishment. <i>Amendment</i> .
§§533, 534. See Penal Code.	
§535. Manner of keeping. <i>Annotated</i> .	§541b, Art. 341b. Duties of officers and grand juries as to enforcement of the law. <i>Amendment</i> .
§536 to 540. See Penal Code.	
§541, Art. 341. Punishment for keeping. <i>Amendment</i> .	

#### §532—ART. 339.—Disorderly house defined.

A disorderly house is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation, or any theatre, play-house, or house where spirituous, vinous, or malt liquors are kept for sale, and prostitutes, lewd women, or women of bad reputation for chastity are employed, kept in service, or permitted to display or conduct themselves in a lewd, lascivious, or indecent manner, or to which persons resort for the purpose of smoking or in any manner using opium. [Amendment April 4; July 6, 1889; 21 Leg. p. 33.]

**§535. Manner of keeping.**

(1.) A house is not necessarily a disorderly house within the meaning of the statute because it is resorted to by prostitutes and vagabonds. The proof in this case shows that the accused was the proprietor of a combined retail grocery establishment and beer saloon, and that prostitutes and vagabonds resorted to that establishment for the purpose of buying and drinking beer. *Held*, insufficient to support a conviction for "keeping a disorderly house." *Harmes v. S.*, 26 App. 190.

**§541—ART. 341.—Punishment for keeping.**

Any owner, lessee, or tenant who shall keep, or be concerned in keeping, or knowingly permit the keeping of a disorderly house in any house, building, edifice, or tenement owned, leased, or occupied by him, shall be deemed guilty of keeping, or being concerned in keeping, or knowingly permitting to be kept, as the case may be, a disorderly house, and shall be punished by a fine of two hundred dollars for each day he shall keep, be concerned in keeping, or knowingly permit to be kept, such disorderly house. Any owner having information that his house is being kept, used, or occupied as a disorderly house shall be held guilty of knowingly permitting his house to be kept as a disorderly house under this act, unless he shall immediately proceed to prevent the keeping, using, or occupying of such house for such purpose by giving such information to the county or district attorney against such lessee, tenant, or occupant for violation of this act, or take such other action as may reasonably accomplish such result. [Amendment April 4; July 6, 1889; 21 Leg. p. 33.]

**§541a—ART. 341a.—Employment of lewd women an offense; punishment.**

Every owner, lessee, tenant, or manager of any theatre, dance-house, play-house, or house where spirituous, vinous, or malt liquors are kept for sale, who shall knowingly employ or have in service in any capacity in such theatre, play-house, or house where spirituous, vinous, or malt liquors are kept for sale, any prostitute, lewd woman, or woman of bad reputation for chastity, or who shall permit any prostitute, lewd woman, or woman of bad reputation for chastity to display or conduct herself therein in a lewd, lascivious, or indecent manner, shall be deemed guilty of keeping a disorderly house, and shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars. Each day that such person is kept in service or employed or permitted to display or conduct themselves as hereinbefore provided, shall be deemed a separate offense. [Amendment April 4; July 6, 1889; 21 Leg. p. 33.]

**§541b—ART. 341b.—Duties of officers and grand juries as to enforcement of the law.**

Sheriffs and their deputies, constables and their deputies, mayors, marshals, chiefs of police, their deputies and assistants, and policemen of towns and cities are especially charged diligently to discover

and report to the proper legal authorities, and by all lawful means to aid in the enforcement of the law for all violations of the articles of this chapter; the district judges are required to give them specially in charge to the grand juries, and grand juries are required at every term of the district court of their county to call before them each and all officers charged with the enforcement of the articles of this chapter and examine them under oath touching their knowledge and information of violations thereof, and as to their diligence in their enforcement. [Amendment April 4; July 6, 1889; 21 Leg. p. 33.]

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#### CH. 5.—MISCELLANEOUS OFFENSES.

§542, Art. 342 to §547, Art. 343. See Penal Code.

§547a. Construction of the law. *Annotated.*

§548, Art. 344 to §550, Art. 345. See Penal Code.

§547a. Construction of the law.

(1.) The terms, "manifestly designed to corrupt the morals of youth," refer to the design and purpose of the party. *Smith v. S.*, 24 App. 1.

## TITLE II.—OFFENSES AGAINST PUBLIC POLICY AND ECONOMY.

### CH. 1.—ILLEGAL BANKING AND PASSING SPURIOUS MONEY.

§551, Art. 346 to §557, Art. 350. See Penal Code.

### CH. 2.—OF LOTTERIES AND RAFFLES.

§558, Art. 351 to §568, Art. 354b. See Penal Code.

### CH. 3.—GAMING.

§569, Art. 355 to §573, Art. 357. See Penal Code.	§594. Bet; meaning of. <i>Annotated.</i>
§574. Indictment. <i>Annotated.</i>	§595. See Penal Code.
§575. House for retailing. Decisions as to. <i>Annotated.</i>	§596, Art. 365. Permitting house to be used for gaming. See Penal Code.
§576. Public house. Decisions as to. <i>Annotated.</i>	§597. Indictment under preceding article. <i>Annotated.</i>
§576a. Private house. Decisions as to. <i>Annotated.</i>	§598, Art. 366 to §603, Art. 367. See Penal Code.
§577, Art. 358 to §593, Art. 364. See Penal Code.	

#### §574. Indictment.

(1.) It is not essential to the sufficiency of an indictment to charge the offense of betting at a game played with dice, that it shall allege that the accused played the game with another or bet with another person. *Day v. S.*, 27 App. 143.

It is a well established rule of pleading that "if several offenses are embraced in the same general definition, and are punishable in the same manner, they are not distinct offenses, and may be charged in the same count of the indictment." The indictment in this case charged that the accused unlawfully played a game of cards at a "tavern and inn, and in a room in and attached to said tavern and inn." *Held*, sufficient, and not obnoxious to the objection that it is uncertain and duplicitous. *Conner v. S.*, 26 App. 509.

#### §575. House for retailing; decisions as to.

(1.) An "appurtenant" is not a portion of the principal thing, but is something belonging or pertaining to something else which is its principal. The proof in this case showing that the game of cards was played in a part of the saloon, and not in an appurtenant thereto, as charged, and failing to establish the ownership of the premises as alleged, will not support this conviction. *Ballew v. S.*, 26 App. 483.

#### §576. Public house; decisions as to.

(1.) Article 355 of the Penal Code, which prohibits the playing of cards in a public place, expressly enumerates taverns and inns as such public places, but declares that "a private room in an inn or tavern does not come within the definition of public places, unless such room be commonly used for gaming."

In statutory parlance an inn, tavern or hotel means a place for the general entertainment and lodging of all travelers and strangers who apply, paying suitable compensation. A hotel "guest" is one who lives at board or lodging in a hired room, and "lodging" is a place of rest for a night, or a residence for a time—a temporary habitation. An unappropriated guest room in an inn, tavern or hotel, is a public place, even as to one who, as a guest, occupies another or other

**T. 11, CHS. 4-6.] OFFENSES AGAINST PUBLIC POLICY. §§576a-633a.**

rooms in the said inn, tavern or hotel. See the statement of the case for evidence held sufficient to support a conviction for playing cards in a public place. *Conner v. S.*, 26 App. 509.

**§576a. Private house; decisions as to.**

(1.) It is no offense against the laws of this state to bet or wager at a game played with dice or dominoes at a private residence.

The evidence in this case showed that the house in which the playing was done was a private residence, but that it had been frequently resorted to for the purpose of gaming. Under this evidence the trial court instructed the jury that, if the said house was "used commonly and exclusively for the purpose of gaming, defendant would be guilty, even though the house was a private residence." *Held*, that the instruction was erroneous; and that, as the evidence shows that the house was a private residence, it does not support the conviction. *Borders v. S.*, 24 App. 333.

**§594. Bet; meaning of.**

(1.) To bet at any game played with dice, by whatever name the game be known, is an offense under the law of this state. And each separate act of betting at such a game constitutes a distinct offense. The consecutive throwing of dice from nightfall until daybreak does not constitute a continuous game, and the consecutive betting on the different throws does not constitute a continuous offense. *Day v. S.*, 27 App. 143.

**§597. Indictment.**

(1.) An indictment charged that the appellant did unlawfully permit "a game of cards to be played upon his premises, the said premises then and there being appurtenances to a public place, to wit: a house for retailing spirituous liquors." *Held*, sufficient to charge the offense defined by article 365 of the Penal Code. *Ballew v. S.*, 26 App. 483.

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**CH. 4.—NEGLECT OF OFFICERS TO ARREST OR PROSECUTE IN GAMING CASES.**

§604, Art. 368 to §606, Art. 370. See Penal Code.

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**CH. 5.—BETTING ON ELECTIONS.**

§607, Art. 371 to §610, Art. 373. See Penal Code.

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**CH. 6.—UNLAWFULLY SELLING INTOXICATING LIQUORS.**

§611, Art. 374 to §633, Art. 383. See | §633a. Decisions upon the statutes.  
Penal Code. | *Annotated.*

**§633a. Decisions upon the statutes.**

(1.) An order of the commissioners' court, declaring the adoption of local option, which, through manifest inadvertence or by a clerical error, shows that less than a majority of the votes cast were for prohibition, when, as a matter of fact it is apparent from other parts of the same order that there was a majority for prohibition, is not invalidated thereby.

The language of the order announcing the result of the election under the local option law, and that "the sale of intoxicating liquors is absolutely prohibited, except for the purposes and under the regulations prescribed by law," is sufficiently specific and definite. *Ex parte Burrage*, 26 App. 35.

See the opinion for an approval of the ruling of this court in Dawson's Case, 25 Texas Court of Appeals, 670, to the effect that the act of March 30th, 1887, amendatory of the local option law, cannot affect those localities wherein the law was in operation at the time of the adoption of the said amendment, and that it can affect only those localities wherein the local option law was adopted subsequent to the date at which the said amendment took effect. This conviction was had in W. county, wherein the local option law was in force prior to the adoption of the amendatory act of March 30th, 1887, notwithstanding which the trial court gave in charge to the jury the penalty prescribed by the said amendatory act, instead of that prescribed by the general law. *Held*, error. Robinson v. S., 26 App. 82.

The act of March 30th, 1887, amendatory of the general local option law, is operative only in those communities wherein the local option law has been adopted since it went into effect, and cannot affect those communities wherein the general local option law was previously in operation. [Dawson's Case, 25 Texas Ct. App. 670, and Robinson's Case, 26 Texas Ct. App. 82, approved on this question.] Lawhon v. S., 26 App. 101.

At an election held on the ninth day of December, 1886, the local option law was adopted by the voters of Erath county, and the law, as it then existed (authorizing a second election within one year), went into effect. On the twelfth day of September, 1887, the appellant was prosecuted to conviction for a violation of the said law on the twenty-fourth day of June, 1887. On the twelfth day of March, 1888, pending appeal from said conviction, the said local option law, at an election held by the qualified voters of Erath county, was repealed, and, under previous decisions of this court, the appellant relies upon this repeal to reverse the judgment and dismiss the prosecution against him. But the assistant attorney-general insists that by the effect of the amendatory act of July 4th, 1887, extending the period of prohibition to two years, the second election, whereat the local option law was repealed, was a nullity. *Held*, that the said amendatory act could not apply to localities wherein local option was in force at the time of its enactment, and can apply only to localities which have adopted local option since its enactment, or which may hereafter adopt it. The second election in Erath county was legal and valid, and operated to repeal the local option law as it then existed. See the opinion for an elaborate discussion of the question. Dawson v. S., 25 App. 670.

If an election under the local option law, and the prohibition declared thereunder, embraced the *exchange* as well as the *sale* of intoxicating liquors, such election and the order declaring prohibition were without authority of law, and could not have the effect of calling the local option law into operation. Information, therefore, which charges that the sale *and exchange* of intoxicating liquors were embraced in the election is fatally defective. Its obnoxious allegation is descriptive of the offense, and, therefore, cannot be eliminated as surplusage. Ninenger v. S., 25 App. 449.

An indictment which charges that the accused sold intoxicating liquors "after the qualified voters of said county had determined at an election held in accordance with the laws of said state, that the sale *or exchange* of intoxicating liquors should be prohibited," etc., is fatally defective. [Ninenger v. The State, *ante*, cited and approved.] Croom v. S., 25 App. 556.

## CH. 6a.—UNLAWFULLY SELLING ILLUMINATING FLUIDS.

§633b, Art. 383a. Selling illuminating fluids without inspection. *New.*

§633c, Art. 383b. Falsely branding or refilling package of illuminating fluid. *New.*

§633d, Art. 383c. Inspector failing to file complaint. *New.*

§633e, Art. 383d. Inspector trafficking in illuminating fluid. *New.*

§633b—Art. 383a.—Selling illuminating fluids without inspection.

If any person for himself, or as agent for any other person or corporation, shall, contrary to the provisions of this act, sell, attempt

to sell, or use as an illuminant within this state, any of said fluids before first having the same inspected and branded as hereinbefore provided; or shall sell or offer to sell any of said fluids to any person within this state, to be used for illuminating purposes therein, or use the same for such purposes after the same have been inspected and branded "rejected for illuminating purposes," as hereinbefore provided, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than one hundred dollars nor more than three hundred dollars. [Act April 5; July 6, 1889; 21 Leg. p. 122.]

See Civil Statutes, Art. 441a, §6.

**§633c—Art. 388b—Falsely branding or refilling packages of illuminating fluid.**

If any person shall falsely brand any cask, barrel, or other package provided to be branded by this act, or shall refill and use any such cask, barrel, or other package having an inspector's brand thereon, without having the fluids therein first inspected, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than one hundred dollars nor more than three hundred dollars, or imprisoned in the county jail not exceeding six months or both; or if any person shall sell or dispose of any empty cask, barrel, or other package which has been branded by the inspector "approved," according to the provisions of this act, before thoroughly canceling, removing, or effacing said brand from the same, he shall, upon conviction thereof, be deemed guilty of a misdemeanor and punished by a fine of not less than ten dollars nor more than fifty dollars for each cask, barrel, or other package so sold or disposed of. [Act April 5; July 6, 1889; 21 Leg. p. 122.]

See Civil Statutes, Art. 441a, §7.

**§633d—Art. 383c.—Inspector failing to file complaint.**

It shall be the duty of said inspector and deputy district inspectors [appointed under this act] who know of any violation of any of the provisions of this act to enter complaint before any court of competent jurisdiction against any person so offending; and in case said inspector or deputy inspectors, having knowledge of any violation of this act, neglect to enter complaint as required by and provided for in this act, shall be fined in any sum not to exceed five hundred dollars, and shall be removed by the court trying the case from his position as such inspector or deputy inspector. [Act April 5; July 6, 1889; 21 Leg. p. 122.]

See Civil Statutes, Art. 441, §11.

**§633e—Art. 383d.—Inspector trafficking in illuminating fluid.**

No state inspector or deputy inspector shall, while in office, traffic, directly or indirectly, in any article in which any of said fluids is a

constituent part, which he is appointed to inspect; and in case of the violation of the provisions of this section by any state inspector or deputy inspector, he shall be fined in any sum not exceeding five hundred dollars, and shall be subject to removal from office. [Act April 5; July 6, 1889; 21 Leg. p. 122.]

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## CH. 7.—VAGRANCY.

§634, Art. 384 to §637, Art. 385. See Penal Code.

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## CH. 8.—MISCELLANEOUS OFFENSES.

§638, Art. 386 to §642, Art. 388a. See Penal Code.

§643, Art. 388b. Penalty for acting as insurance agent unlawfully. See Penal Code.

§644. Decisions under preceding article. *Annotated.*

§645, Art. 388c to §648, Art. 388f. See Penal Code.

§648a, Art. 388g. Riding, etc., in a railroad car designated for others. *New.*

### §644. Decisions under article 388b.

(1.) It is an established rule of criminal pleading that the facts which constitute the offense must be directly and explicitly averred; that inference and intendment cannot be indulged in testing the sufficiency of an indictment or information, and that the indictment or information must allege everything that is necessary to be proved. To be sufficient to charge the offense of unlawfully acting as an insurance agent, as that offense is defined by the act of July 9th, 1879, indictment or information must allege that the company for which the accused acted as agent was an insurance company. *Brown v. S.*, 26 App. 540.

### §648a—Art. 388g.—Riding or attempting to ride in a railroad car designated for others.

If any passenger upon a train provided with separate coaches for colored passengers shall ride or attempt to ride in a coach or division of same not designated for his or her color, after having been forbidden to do so by the employé of the railroad in charge of the train, he shall be guilty of a misdemeanor and punished by a fine of not less than five nor more than twenty dollars; *provided*, that the railway companies shall have the right to regulate and control the travel on all other coaches in each of their said trains except the two coaches or double coach, as the case may be, provided for in this act. [Act April 19; July 6, 1889, §5; 21 Leg. p. 132.]

See Civil Statutes, §4233a.



T. 12, CHS. 1-3a.] OFFENSES AGAINST PUBLIC HEALTH. §§652a, 671a.

## TITLE 12.—OF OFFENSES AGAINST PUBLIC HEALTH.

### CH. 1.—OCCUPATION AND ACTS INJURIOUS TO HEALTH.

§649, Art. 389 to §651, Art. 391. See Penal Code.

### CH. 2.—SALE OF UNWHOLESOME FOOD, DRINK OR MEDICINE.

§652, Art. 392. Selling corrupted or unwholesome substance. See Penal Code.

§652a. Decisions on the preceding article. *Annotated.*  
§653, Art. 393 to §664, Art. 395d. See Penal Code.

#### §652a. Decisions under Article 392.

**Selling diseased meat.**—To constitute the offense of selling diseased meat, the seller must have known at the time he sold it that the meat was diseased; and to warrant a conviction, the evidence must affirmatively establish such knowledge. See the statement of the case for evidence *held* insufficient to support a conviction for selling diseased meat. *Teague v. S.*, 25 App. 377.

**Offering for sale adulterated food.**—See the statement of the case for an information *held* sufficient to charge the offense of offering adulterated food for sale.

To support a conviction for offering adulterated food for sale it devolves upon the State to prove not only that the accused offered such food for sale, but that, when he did so, he knew that the said food was adulterated. See the statement of the case for evidence *held* insufficient to support a conviction for offering adulterated food for sale. *Sanchez v. S.*, 27 App. 14.

### CH. 3.—UNLAWFUL PRACTICE OF MEDICINE.

§665, Art. 396 to §671, Art. 399. See Penal Code.

### CH. 3a.—UNLAWFUL PRACTICE OF PHARMACY.

§671a, Art. 399a. Practicing without being qualified, unlawful. *New.*  
§671b, Art. 399b. Penalty for unlawfully practicing. *New.*

§671c, Art. 399c. Fraudulently procuring registration. *New.*  
§671d, Art. 399d. Act shall be given in charge to grand jury. *New.*

#### §671a—Art. 399a.—Practicing without being qualified, unlawful.

It shall be unlawful for any person, unless a qualified pharmacist within the meaning of this act, to open or conduct any pharmacy or store for compounding medicines, or for any one not a qualified pharmacist to prepare physicians' prescriptions or compound medicines, except under the direct supervision of a qualified pharmacist as hereinafter provided. [Act April 6; July 6, 1889; 21 Leg. p. 125.]

See Civil Statutes, Art. 3624a, §1.

**§671b—Art. 399b.—Penalty for unlawfully practicing.**

Any person not a qualified pharmacist, but continues to compound prescriptions or retail medicines without complying with this act, shall upon the first conviction be sentenced to pay a fine of not less than fifty nor more than one hundred dollars; and upon the second and every subsequent conviction, shall be sentenced to a fine of not less than one hundred nor more than two hundred dollars. [Act April 6; July 6, 1889; 21 Leg. p. 127.]

See Civil Statutes, Art. 3624a, §12.

**§671c—Art. 399c.—Fraudulently procuring registration.**

Any person who shall procure or attempt to procure registration for himself or for another, under this act, by making or causing to be made any false representation, shall be deemed guilty of a misdemeanor, and shall be fined not less than twenty-five nor more than one hundred dollars, and the name of the person so fraudulently registered shall be stricken from the register. [Act April 6; July 6, 1889; 21 Leg. p. 127.]

See Civil Statutes, Art. 3624a, §13.

**§671d—Art. 399d.—Act shall be given in charge to grand jury.**

All courts having jurisdiction in criminal causes are required to give this act in charge to each grand jury impanelled in such courts. [Act April 6; July 6, 1889; 21 Leg. p. 127.]

See Civil Statutes, Art. 3624a, §15.

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**CH. 3b.—UNLAWFUL PRACTICE OF DENTISTRY.**

§671e, Art. 399e. Practicing without license, unlawful. *New.*

§671f, Art. 399f. Penalty for unlawfully practicing. *New.*

§671g, Art. 399g. Fines appropriated to county school fund. *New.*

§671h, Art. 399h. License shall be recorded. Fee for recording. *New.*

§671i, Art. 399i. Burden of proof upon defendant to show authority. *New.*

§671j, Art. 399j. Conflicting laws repealed. *New.*

**§671e—Art. 399e.—Practicing without license, unlawful.**

From and after the passage of this act it shall be unlawful for any person to engage in the practice of dentistry in the State of Texas, unless said person has obtained license from a board of examiners, duly appointed and authorized by this act to issue such license; *provided*, that dentists who have been in the regular practice of dentistry in this state for three years next preceding the passage of this act shall not be required to submit to an examination, and shall be entitled to a license without fee, which shall be transmitted to him by mail or otherwise, upon his application, accompanied by satisfactory evidence to the fact of his having been in the

T. 12, CH. 4.] OFFENSES AGAINST PUBLIC HEALTH. §671f-671j.

regular practice for the time required. [Act March 27; July 6, 1889; 21 Leg. p. 90.]

See Civil Statutes, Art. 1644a, §1.

**§671f—Art. 399f.—Penalty for unlawfully practicing.**

Any person who shall, in violation of the provisions of this act, practice dentistry in this state for a fee or reward, shall be liable to indictment, and on conviction shall be fined not less than one hundred nor more than two hundred dollars; nor shall it be construed to prevent persons from extracting teeth, nor in any way interfere with physicians and surgeons in their practice as such. [Act March 27; July 6, 1889; 21 Leg. p. 90.]

See Civil Statutes, Art. 1644a, §10.

**§671g—Art. 399g.—Fines appropriated to county school fund.**

All fines collected from prosecutions under this act shall be appropriated to the common school fund in the county where collected. [Act March 27; July 6, 1889; 21 Leg. p. 90.]

See Civil Statutes, Art. 1644a, §11.

**§671h—Art. 399h.—License shall be recorded. Fee for recording.**

Every person to whom license is issued by said board of examiners shall, within thirty days from the date thereof, present the same to the clerk of the county in which he resides, who shall officially record said license in a book in his office and shall be entitled to demand a fee of fifty cents for his services, but a temporary license issued under section 9 of this act need not be recorded. [Act March 27; July 6, 1889; 21 Leg. p. 90.]

See Civil Statutes, Art. 1644a, §12.

**§671i—Art. 399i.—Burden of proof upon defendant to show authority.**

On the trial of any person indicted under the provisions of this act, it shall be incumbent upon the defendant, in order to exempt him from the penalties of this act, to show that he has authority, under the law, to practice dentistry in this state. [Act March 27; July 6, 1889; 21 Leg. p. 90.]

See Civil Statutes, Art. 1644a, §13.

**§671j—Art. 399j.—Conflicting laws repealed.**

All laws or parts of laws in conflict with this act be, and the same are hereby, repealed. [Act March 27; July 6, 1889; 21 Leg. p. 90.]

See Civil Statutes, Art. 1644a, §14.

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CH. 4.—VIOLATIONS OF QUARANTINE.

§672, Art. 400 to §673, Art. 403c. See Penal Code.

## TITLE 13.—OF OFFENSES AFFECTING PROPERTY HELD IN COMMON FOR THE USE OF THE PUBLIC.

### CH. 1.—OBSTRUCTION OF NAVIGABLE STREAMS, ROADS, STREETS AND BRIDGES.

§679, Art. 404 to §684, Art. 407. See Penal Code.	§687. What constitutes a public road. Evidence. <i>Annotated.</i>
§685. Willful defined. <i>Annotated.</i>	§688, Art. 407 to §690, Art. 407a. See Penal Code.
§686. See Penal Code.	

#### §685. Willful defined.

To constitute the offense of obstructing a public road, it must appear from the evidence that the obstruction was "willfully" erected. "Willful," in legal parlance, means "with legal malice;" "an evil intent," or the performing of an act without reasonable ground to believe it to be lawful. In this case the State proved the location of the road, and the fact that the accused obstructed it by building a fence across it; and further that, when notified to remove it as an obstruction, the accused stated that he would remove it at once upon being convinced that his fence was not on his own land and crossed a public road. The defense proved that before he built the fence the accused had the land surveyed, and, according to the survey, built the said fence on his own land. *Held*, insufficient to support a conviction for *willfully* obstructing a public road. *Parsons v. S.*, 26 App. 192.

#### §687. What constitutes a public road. Evidence.

Evidence which shows that the fence alleged to be the obstruction was on the land of the accused when the road through it was established, and that the said road was never opened after it was established, will not support a conviction for obstructing a public road. *Rankin v. S.*, 25 App. 694.

A road not located in accordance with the order of the commissioners' court establishing it, is not a public road. *Owen v. S.*, 24 App. 201.

When a road was obstructed by the accused, not willfully, but with the belief, based on good cause, that he had the legal right to obstruct it, he is not guilty of an offense. *Owen v. S.*, 24 App. 201.

### CH. 2.—OFFENSES PERTAINING TO PUBLIC ROADS AND IRRIGATION.

§691, Art. 408 to §697, Art. 410. See Penal Code.	§699. See Penal Code.
§697a, Art. 410a. Failure of duty as road commissioner. <i>New.</i>	§699a. Requisites of information. <i>Annotated.</i>
§698, Art. 411. See Penal Code.	§700, Art. 412 to §702, Art. 414. See Penal Code.
§698a, Art. 411a. Dismissal of hand for inefficiency. <i>New.</i>	§702a, Art. 414a. Injury to irrigating canals, etc. <i>New.</i>

#### §697a—ART. 410a.—Failure of duty as road commissioner.

A road commissioner when employed shall have control over all overseers, hands, tools, machinery, and teams to be used upon the roads in his district; and shall have the power to require overseers to order out his hands in any number he may designate for the purpose of opening, working, or repairing the roads or building or re-

pairing bridges or culverts of his district; and it shall be the duty of such road commissioner to see that all the roads and bridges of his district are kept in good repair, and he shall, under the direction and control of the commissioners' court, inaugurate a system of grading and draining public roads in his district, and see that such system is carried out by the overseers and hands under his control, and shall obey all orders of the commissioners' court; and he shall be responsible for the safe keeping and liable for the loss or destruction of all machinery, tools, or teams placed under his control, unless such loss is without his fault, and [when] he shall be discharged he shall deliver them to the person designated by the court.

He shall expend such money as may be placed in his hands by the commissioners' court under its direction in the most economical and advantageous manner on the public roads, bridges, and culverts of his district; and all his acts shall be subject to the control, supervision, orders, and approval of the commissioners' court; he shall work the convicts and such other labor as may be furnished him by the commissioners' court; and when the road commissioner shall have funds in his hands to expend for labor on the roads, and it shall be necessary for any overseer or overseers in his district to work more than five days during any one year upon the public roads, he may employ such overseers to continue their duties as such for such a length of time as may be necessary, and pay them for their services not more than one dollar and fifty cents per day for the time actually employed after the five days; *provided*, that hands shall not be required to work when there shall be on hand, after building and repairing bridges, a sufficient road fund to provide for the necessary work on the roads.

Said road commissioner shall report to the commissioners' court at each regular term, under oath, showing an itemized account of all money he has received to be expended on roads or bridges and what disposition he has made of the money, and showing the condition of all roads, bridges, and culverts in his district, and such other facts as the court may desire information upon, and shall make such other reports and at such time as the court may desire.

Any road commissioner who shall willfully fail to comply with any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by fine of not less than twenty-five nor more than two hundred dollars. [Act April 6; July 6, 1889; 21 Leg. p. 134.]

See Civil Statutes, Art. 4390a, Secs. 2, 3, 4 and 5.

**§698a—ART. 411a.—Dismissal of hand for inefficiency.**

Overseers shall dismiss from the road any hand or hands, whether working for themselves or as substitutes for others, who shall fail to do good and efficient work, or who shall hinder other hands from

T. 13, CHS. 3, 4] OFFENSES AFFECTING PUBLIC PROPERTY. §§699a-714a.

doing their work properly, or dismiss any hand who may be intoxicated, or who shall refuse to obey any reasonable order of the overseers; and the overseer shall proceed against such hand or hands so dismissed in the same manner as if they had refused to obey the summons to work upon the road. [Act April 2; July 6, 1889; 21 Leg. p. 22.]

See Civil Statutes, 4429a.

§699a. **Requisites of information.**

Information to charge the offense of failing to work the public roads, as defined by article 411, of the Penal Code, must allege the legal liability of the accused to such service. Such liability is an issuable fact, and must be proved by the State. *Bennett v. S.*, 26 App. 671.

§702a—ART. 414a.—**Injury to irrigating canals, etc.**

Any person who shall willfully or through gross negligence injure any irrigating canal or its appurtenances, wells, or reservoirs, or who shall waste the water thereof, or shall take the water therefrom without authority, shall be deemed guilty of a misdemeanor, and for each offense shall be liable to a fine not exceeding five hundred dollars. [Act March 19; July 6, 1889; 21 Leg. p. 100.]

See Civil Statutes, Art. 4390a, §14.

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CH. 3.—OFFENSES RELATING TO FERRIES.

§703, Art. 415 and §704, Art. 416. See Penal Code.

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CH. 4.—OFFENSES RELATING TO PUBLIC GROUNDS  
AND BUILDINGS.

§705, Art. 417. Injuring or defacing a public building. *Amendment.*

§706, Art. 418 to §714, Art. 422c. See Penal Code.

§714a, Art. 422cc. Purchaser turning loose too many stock on leasehold land. *New.*

§§715 and 716, Art. 422d. See Penal Code.

§705—Art. 417.—**Injuring or defacing a public building.**

If any person shall willfully injure or deface any public building or the furniture therein in this state, he shall be fined not less than five nor more than five hundred dollars. The word deface in this act shall be held to apply to writing, carving, or scratching on the walls or plastering or furniture of said building, or staining the same with paint or any other article which will produce a discoloration of the same. [Amendment May 14, 1888; 20 Leg. S. S. p. 5.]

§714a—Art. 422cc.—**Purchaser turning loose too many stock on leasehold land.**

Any person desiring to lease any portion of the public lands belonging to the several funds mentioned in this act, shall make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease; thereupon the commissioner, if satisfied that the lands applied for

are not in immediate demand for purposes of actual settlement, and that such lands can be leased without detriment to the public interest, shall notify the applicant in writing that his proposition to lease is accepted; and thereupon he shall execute and deliver to the lessee, in the name and by the authority of the state, a lease of said land for such term as may be agreed upon, and deliver the same to such lessee when satisfied that the lessee has paid to the treasurer of the state the rent for one year in advance. No lands classified as grazing land under this act shall be subject to sale during the existence of such lease, and the possession thereof by the lessee shall not be disturbed during the term of such lease so long as the rents are paid promptly in advance each year as required by this act. The land classified as agricultural land, which may be leased under this act shall be leased subject to sale as provided by this act; and whenever such leased land may be purchased, the lessee shall give immediate possession to such purchaser; *provided*, that the lessee shall have a pro rata credit upon his next year's rent or the money refunded to him by the treasurer, as he may elect; *provided further*, that no such sale shall be permitted where such lessee shall have previously placed improvements of the value of one hundred dollars upon such section of lands sought to be purchased. That no purchaser or other person than the lessee shall be permitted to turn loose within such leasehold more than one head of horses, mules, or cattle, for every ten acres of land purchased, owned, or controlled by him and uninclosed, or in lieu thereof four head of sheep or goats to every ten acres of land so purchased, owned, or controlled and uninclosed. Each violation of the provisions of this act which restricts the number of stock that may be turned loose on lands leased from the state, shall be an offense, and the offender on conviction shall be punished by fine of not less than one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this section shall constitute a separate offense. [Act April 8; July 6, 1889; 21 Leg. p. 50.]

See Civil Statutes, Art. 4052.

## CH. 5.—OFFENSES RELATING TO THE PROTECTION OF FISH, BIRDS AND GAME.

§717, Art. 423, to §729, Art. 429. See Penal Code.	§730a, Art. 430a. Oysters may be taken from beds for planting. <i>New.</i>
§730, Art. 430. Certain counties exempt. <i>Amendment.</i>	§731, Art. 430a to §736, Art. 430a. See Penal Code.

### §730—ART. 430.—Certain counties exempt.

That the following counties are hereby exempted from the provisions of articles 426, 426½, 427, 428, and 429, of this chapter, to-

wit: Nacogdoches, Hood, Bosque, Somervell, Sabine, San Augustine, Shelby, Titus, Franklin, Hunt, Rockwall, Hopkins, Montgomery, Brazos, Rains, Williamson, Wood, Coryell, Hamilton, Brown, Mills, Comanche, Runnels, Cooke, Wise, Montague, Madison, Leon, Clay, Parker, Jack, and the unorganized counties attached to the same for judicial purposes; Ellis, Anderson, Freestone, Cherokee, Stephens, Eastland, Erath, Palo Pinto, Polk, Guadalupe, Throckmorton, Shackelford, Callahan, Taylor, Jones, Nolan, Mitchell, Haskell, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Gaines, Dawson, Borden, Scurry, Fisher, Howard, Martin, Andrews, Archer, Wichita, Baylor, Wheeler, Oldham, Knox, King, Dickson [Dickens], Crosby, Wilbarger, Childress, Lubbock, Hockley, Cochran, Bailey, Lamb, Lamar, Hale, Floyd, Motley, Cottle, Hall, Briscoe, Swisher, Castro, Parmer, Greer, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Gray, Carson, Potter, Hutchinson, Hartley, Moore, Roberts, Hemphill, Lipscomb, Ochiltree, Hansford, Sherman, Hardeman, Dallam, Smith, Upshur, Cass, San Jacinto, Camp, Dimmit, Maverick, Kinney, Cameron, Jackson, Robertson, Kaufman, and the unorganized county of Zavalla; *provided*, that the exemption from the operation of this law shall not apply to article 425; *and, provided*, that the counties of Grimes, Angelina, Van Zandt, Walker, Trinity, Parker, Jack, Young, and Bell are hereby exempted from articles 425, 426, 426½, 427, 428, and 429 of this act; *and, provided*, that the county of Houston is hereby exempted from the provisions of articles 426, 426½, 427, 428, and 429 of this act; *and, provided*, that the counties of Fannin, Delta, and Hopkins are hereby exempted from the provisions of articles 426 and 426½; *and, provided*, that the counties of Lee and Fayette are exempted from the provisions of articles 426 and 429; *and, provided*, that the counties of Bastrop, Frio, and Brazoria are hereby exempted from the provisions of article 429; *and, provided*, that the counties of Gonzales, Karnes, Atascosa [and] Morris are hereby exempted from the provisions of articles 426, 426½, 427, and 428; *and, provided*, that the counties of Bowie and Rusk are hereby exempted from the provisions of articles 427, 428, and 429; *provided further*, that the counties of Titus, Franklin, Rains, and Wood shall be exempted from the provisions of article 423; and the counties of Waller, Tyler, Jasper, and Newton shall be exempted from the provisions of article 426; *provided further*, that the counties of Burnet and Lampasas are hereby exempt from the game and fish laws of this state; *provided*, that the county of Karnes shall be exempted from the provisions of articles 423, 424, 425, and 426. [Amendment April 4, 1889; 21 Leg. p. 34.]

§730a—ART. 430a.—Oysters may be taken for planting.

That persons may take oysters from their beds within the prohibited time for the purpose of planting. [Amendment April 4, 1889; 21 Leg. p. 34.]



## TITLE 14.—OF OFFENSES AGAINST TRADE, COMMERCE AND THE CURRENT COIN.

### CH. 1.—OF FORGERY AND OTHER OFFENSES AFFECTING WRITTEN INSTRUMENTS.

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| <p>§788, Art. 431 to §749, Art. 438. See Penal Code.</p> <p>§750. Subjects of forgery; decisions as to. <i>Annotated.</i></p> <p>§751, Art. 439 to §755, Art. 443. See Penal Code.</p> | <p>§756. Passing forged instruments; decisions as to. <i>Annotated.</i></p> <p>§757, Art. 444 to §765, Art. 450. See Penal Code.</p> <p>§765. Evidence. <i>Annotated.</i></p> <p>§766. Charge of the court. <i>Annotated.</i></p> |
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#### §750. Subjects of forgery; decisions as to.

An order for merchandise may be the subject of forgery.

As a general rule, a written instrument which, if genuine, would be valid for the purpose intended, can be made the basis for an indictment for forgery. On the other hand, if void or invalid upon its face, and incapable of being made good by the averment of extrinsic facts, an indictment for forgery cannot be predicated upon it. See the opinion on the question.

An order to "let Bare have \$5 in grosses and charge the same to" the purported drawer, is an order for articles of value, implies an obligation to the extent of five dollars, and, without the averment of extrinsic facts, will support an indictment for forgery. *Hendricks v. S.*, 26 App. 178.

#### §756. Passing forged instruments; decisions as to.

**Indictment.**—See the statement of the case for the charging part of an indictment *held* sufficient to charge the offense of uttering a forged instrument in writing, knowing it to be forged. *Thurmond v. S.*, 25 App. 266.

The pledging of a forged instrument as security for a debt, under an agreement to redeem the same within a specified time, is an uttering of the same within the meaning of the statute, and the trial court did not err in refusing to charge the jury to the converse of this rule, and to the effect that, to constitute the uttering of the forged instrument, it must have been given by the accused absolutely in payment or exchange. See the opinion on the question. *Thurmond v. S.*, 25 App. 266.

While it was competent, in a prosecution for attempting to pass a forged instrument, for the State to prove that the accused attempted to pass the same forged instrument to another than the person alleged in the indictment, and at another time and place, it was incumbent on the court to charge the jury that such evidence was admissible only upon the issue of the fraudulent intent of the accused in the transaction on trial. Omission to so charge was fundamental error. *Burks v. S.*, 24 App. 332.

#### §765. Evidence.

The State introduced in evidence the alleged forged instrument before proving that the same was written by the accused, but subsequently produced such proof. *Held*, that such practice, though irregular, was not materially erroneous. *Williams v. S.*, 24 App. 342.

As tending to establish the fraudulent intent of the accused in the transaction for which he was on trial, it was competent for the State to prove that, at a different time and place on the same day, the accused attempted to pass the forged instrument to a different person than the party alleged as the injured person in the indictment. But the failure of the charge to limit and circumscribe the purpose and object of such evidence was fundamental error. *Burke v. S.*, 24 App. 326.

#### §766. Charge of the court.

It is not only the province, but it is the duty of the trial judge to construe an alleged forged instrument, and to instruct the jury as to its legal effect, had it been genuine. In this case the court properly charged that, if the alleged forged instrument were genuine, it would create a pecuniary obligation.

Objections to the admission in evidence in this case of the alleged forged instrument were properly overruled, inasmuch as the letter S, before the figures \$43.00, imports nothing, is no part of the said instrument, and constitutes no part of the said instrument.

The trial court did not err in admitting in evidence the declarations of the defendant with regard to the transaction involved in the prosecution, made by him when not in custody nor under arrest. Nor was it error to permit the State to prove that defendant was known by another name than that he assumed in the county of the forum. *Burke v. S.*, 24 App. 326.

Three witnesses testified positively that the purported drawer of the alleged forged order authorized the accused to write it and sign his name. Under this proof the trial court erred in failing to instruct the jury affirmatively that if they believed that the defendant wrote the order, and signed it by authority of the purported drawer, or if they had a reasonable doubt on that question, he should be acquitted. Exception being reserved to the omission, a mere negative presentation of the question was not sufficient. *Williams v. S.*, 24 App. 342.

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## **CH. 2.—FORGERY OF LAND TITLES, ETC.**

**§767, Art. 451 to §776, Art. 457. See Penal Code.**

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## **CH. 3.—OF COUNTERFEITING AND DIMINISHING VALUE OF CURRENT COIN.**

**§777, Art. 459 to §786, Art. 467. See Penal Code.**

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## **CH. 4.—OF OFFENSES WHICH AFFECT FOREIGN COMMERCE.**

**§787, Art. 468 to §793, Art. 473. See Penal Code.**

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## **CH. 5.—FALSE WEIGHTS AND MEASURES.**

**§794, Art. 474 to §796, Art. 476. See Penal Code.**

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## **CH. 6.—OF OFFENSES BY PUBLIC WEIGHERS.**

**§797, Art. 477 to §801, Art. 478c. See Penal Code.**

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## **CH. 7.—MISCELLANEOUS OFFENSES.**

**§802, Art. 479 to §808, Art. 483. See Penal Code.**

CH. 8.—CONSPIRACIES AGAINST TRADE; TRUSTS.

§808a, Art. 483a. Trusts defined. <i>New.</i>	§808f, Art. 483f. Penalty for each day's violation recoverable by suit. <i>New.</i>
§808b, Art. 483b. Violation of the law punishable by fine and imprisonment. <i>New.</i>	§808g, Art. 483g. Provisions of act cumulative. <i>New.</i>
§808c, Art. 483c. Indictment; requisites of. <i>New.</i>	§808h, Art. 483h. Act does not apply to agricultural products. <i>New.</i>
§808d, Art. 483d. Evidence. <i>New.</i>	
§808e, Art. 483e. Persons out of the state may be indicted. <i>New.</i>	

§808a—ART. 483a.—**Trusts defined.**

A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any, or all of the following purposes: *First*—To create or carry out restrictions in trade. *Second*—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. *Third*—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. *Fourth*—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state. *Fifth*—To make or enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected. [Act March 30, 1889; 21 Leg. p. 141.]

See Civil Statutes, Art. 484a, §1.

§808b—ART. 483b.—**Violation of the law punishable by fine and imprisonment.**

Any violation of either or all the provisions of this act shall be, and is hereby, declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employé, or in any

other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense. [Act March 30, 1889; 21 Leg. p. 141.]

See Civil Statutes, Art. 4848a, §6.

**§808c—Art. 483c.—Indictment; requisites of.**

In any indictment for an offense named in this act it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created. [Act March 30, 1889; 21 Leg. p. 141.]

See Civil Statutes, Art. 4848a, §7.

**§808d—Art. 483d.—Evidence.**

In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such. [Act March 30, 1889; 21 Leg. p. 141.]

See Civil Statutes, Art. 4848a, §8.

**§808e—Art. 483e.—Persons out of the state may be indicted.**

Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act which do not in their commission necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions whether within or without the state. [Act March 30, 1889; 21 Leg. p. 142.]

Civil Statutes, Art. 4848a, §9.

**§808f—Art. 483f.—Penalty for each day's violation recoverable by suit.**

Each and every firm, person, corporation or association of persons, who shall in any manner violate any of the provisions of this act shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas, in any county where the offense is committed or where either of the offenders reside, or in Travis county. And it shall be the duty of the attor-

ney-general, or the district or the county attorney, to prosecute for and recover the same. [Act March 30, 1889; 21 Leg. p. 141.]

See Civil Statutes, Art. 4848a, §10.

**§808g—Art. 483g.—Provisions of act cumulative.**

The provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state. [Act March 30, 1889; 21 Leg. p. 141.]

See Civil Statutes, Art. 4848a, §12.

**Art. 808h—Art. 483h.—Act does not apply to agricultural products, etc.**

The provisions of this act shall not apply to agricultural products or live-stock while in the hands of the producer or raiser. [Act March 30, 1889; 21 Leg. p. 141.]

See Civil Statutes, Art. 4848a, §13.

## TITLE 15.—OF OFFENSES AGAINST THE PERSON.

### CH. 1.—ASSAULT, AND ASSAULT AND BATTERY.

§809 and §810, Art. 484. See Penal Code.	§833, Art. 495a. Abusive language an offense. See Penal Code.
§811. Constituents of the offense. <i>Annotated.</i>	§833a. Requisite of information. <i>Annotated.</i>
§812, Art. 485 to §823, Art. 490. See Penal Code.	§834, Art. 495b. See Penal Code.
§824. In self-defense. <i>Annotated.</i>	
§825, Art. 491 to §832, Art. 495. See Penal Code.	

#### §811. Constituents of the offense.

The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery, as that offense is defined by article 484 of the Penal Code. The injury intended may be either bodily harm, constraint, a sense of shame or other disagreeable emotion of the mind. Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault. If the means used was a deadly weapon, the assault would become aggravated. *Flournoy v. S.*, 25 App. 244.

To constitute assault and battery, unlawful violence must be used upon another, and such violence must be used with the intent to injure the person upon whom it is inflicted. Unaccompanied by such intent, the violence, however unlawful, does not constitute assault and battery.

The intent to injure will be presumed when an injury has been inflicted, but when no injury has been inflicted no such presumption will obtain, and the intent must be proved. The proof in this case failing to show the infliction of an injury, and preponderating against the intent to inflict injury, the conviction is against the evidence, and the trial court erred in refusing a new trial. *Ware v. S.*, 24 App. 521.

#### §824. In self-defense, etc.

A husband has the right to defend himself against an assault committed upon him by his wife, and unless he employs greater force than is necessary to repel the violence of his wife, he cannot be held guilty of an assault and battery. See the opinion for the substance of evidence held insufficient to support a conviction for aggravated assault and battery by a husband on his wife. *Leonard v. S.*, 27 App. 186.

An "intent to injure" is an essential element of assault and battery. This intent is presumed when the injury has been inflicted by violence to the person, and it devolves upon the accused to show accident or innocent intent. See the opinion and the statement of the case for the substance of evidence held insufficient to support a conviction for assault and battery. *McConnell v. S.*, 25 App. 329.

Under the facts of this case the trial court erred in omitting to charge the jury, in connection with its general charge on self-defense, to the effect that if the defendant was assaulted on his own premises, or at his place of business, by the deceased, with an instrument calculated to inflict serious bodily injury upon him, and if he then retreated and picked up the stick—an instrument of like character—with which to defend himself, and having returned to the scales, where he had the right to go, with no intention of himself renewing the conflict, and deceased again assaulted him with the iron scoop, then and in that event defendant, in his necessary self-defense, had the right to use the stick in repelling such second assault upon him, and if in doing so he killed deceased, then, under such circumstances he would be guilty of no offense, and he should be acquitted.

The charge of the court was otherwise insufficient in that it restricted the defendant's right of self-defense to a combat with the deceased alone, and to appearances of danger from the deceased alone. Whereas the proof disclosed the

presence and co-operation of another man with the deceased, and hostile demonstrations towards defendant of such other person.

See the opinion, *in extenso*, and the statement of the case, for evidence under which the trial court, in connection with its general charge on self-defense, should have instructed the jury, in effect, that if there was no cessation of the conflict between the defendant and the deceased from the time the first blow was struck, and the deceased struck the first blow with an iron scoop, and the defendant struck with a stick in his own self-defense, then the latter was guilty in law of no offense whatever. *Bean v. S.*, 25 App. 347.

§833—ART. 495a. Abusive language an offense. See Penal Code.

§833a. Requisites of information.

In order to charge the offense of using abusive language to another in a manner calculated to provoke a breach of the peace, the information should allege that the language was used in the presence or hearing of the injured party. *Elkins v. S.*, 26 App. 220.

## CH 2.—AGGRAVATED ASSAULT AND BATTERY.

§835, Art. 496. See Penal Code.

§836. Indictment in general. *Annotated.*

§837 to §840. See Penal Code.

§841. When committed upon a female or child. *Annotated.*

§842, Art. 497 to §849, Art. 498. See Penal Code.

§836. Indictment in general.

Article 714, of the Code of Criminal Procedure, declares that murder includes all the inferior degrees of culpable homicide, and also an assault with intent to commit murder, and that an assault with intent to commit any felony includes all assaults of an inferior degree. It is no longer an open question that, under this statute, a conviction for aggravated assault may be had under an indictment for murder.

The indictment in this case charges that the appellant did "unlawfully, and with his implied malice aforethought, kill and murder Samuel Wooldridge, by then and there striking, beating, bruising and wounding said Wooldridge with a stick." *Held* that, independent of the rule announced in the first head-note, the indictment sufficiently charges the offense of aggravated assault and battery, under the seventh subdivision of article 835, of the Penal Code, which makes an assault aggravated "when serious bodily injury is inflicted upon the person assaulted." *Bean v. S.*, 25 App. 347.

§841. When committed upon a female or child.

That the accused was an adult male, and that he assaulted a female, was the aggravation charged in the information. The evidence fails to show that the accused was an adult male, and, therefore, it is insufficient to support the conviction.

The penalty assessed in this case was a fine of five hundred dollars and confinement in the county jail for the period of twelve months. *Held*, that in view of the evidence in the case the penalty was excessive. *Robinson v. S.*, 25 App. 111.

## CH. 3.—OF ASSAULTS WITH INTENT TO COMMIT SOME OTHER OFFENSE.

§850 and §851, Art. 499. See Penal Code.

§852 and §853, Art. 500. Assault with intent to murder. See Penal Code.

§853a. Charge of the court. *Annotated.*

§854, Art. 501 to §866, Art. 503. See Penal Code.

§867. What constitutes an assault with intent to rape. *Annotated.*

§868, Art. 504 to §875, Art. 506. See Penal Code.

§863a. Assault with intent to murder—Charge of the court.

An assault, and a specific intent to kill, are elements which must concur to constitute the offense of assault with intent to murder. Charge of the

court, therefore, which, in defining assault with intent to murder, extended the intent to "do such serious bodily injury as would probably end in death," was fundamentally erroneous. *Moore v. S.*, 26 App. 322.

**§867. What constitutes an assault with intent to rape.**

To constitute an assault under the law of this state there must be the use of some unlawful violence upon the person of another, with intent to injure him or her, or some threatening gesture, showing in itself or by words accompanying it an immediate intention to commit a battery.

Assault to rape is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intention to commit rape; and such an assault can only be committed by means of force or attempted force. *Carroll v. S.*, 24 App. 366.

## CH. 4.—OF MAIMING, DISFIGURING AND CASTRATION.

§876, Art. 507. Maiming defined. See | §878, Art. 508 to §882, Art. 512. See  
Penal Code. | Penal Code.

§877. Decisions as to. *Annotated.*

**§877. Decisions as to maiming.**

Article 507, of the Penal Code, enacts that: "To maim is to willfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear; to put out an eye, or in any way to deprive the person of any other member of his body." A front tooth, though not specified in the first clause of said article, is a "member of the body," as that phrase is used in the latter clause. When, however, as in this case, the evidence describes the tooth as a "corner tooth," a question of fact for the determination of the jury is raised, i. e., whether the tooth was or was not a "front tooth." *High v. S.*, 26 App. 545.

Biting off a portion of a member of a person's body does not necessarily constitute maiming. In all such cases the jury should be left, under proper instructions, to determine whether or not the injury was such as substantially to deprive the injured party of the member. *Bowers v. S.*, 24 App. 542.

To constitute the offense of maiming, the act must be done both willfully and maliciously.

A *willful* act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A *malicious* act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act, intentionally done without legal justification or excuse. In all trials for maiming, the legal signification of the terms "willfully" and "maliciously" must be explained to the jury by the charge of the court.

See the statement of the case for evidence which, tending to show that the act of the accused was neither willfully nor maliciously done, within the legal signification of those terms, was erroneously excluded by the trial court, such evidence being competent upon the question of intent. *Bowers v. S.*, 24 App. 542.

## CH. 5.—FALSE IMPRISONMENT.

§888, Art. 513 to §890, Art. 517. See | §892, Art. 518 to §894, Art. 520. See  
Penal Code. | Penal Code.

§891, Charge of the court. *Annotated.*

**§891. Charge of the court.**

The refusal of the following charge asked by the accused on his trial for false imprisonment was *held* to be error: "Where the means used are threats, they must be such as are calculated to operate upon the person threatened and inspire a just fear of some injury to his person or property, and must be sufficient to intimidate and prevent such person from moving beyond the bounds in which he was detained, if he was detained at all. A mere contest and wordy



altercation between two persons for the possession of an article of personal property, each in good faith claiming the right thereto, and in which the party in possession, and sought to be dispossessed, voluntarily and of his own accord remained at the place of altercation for the purpose of better protecting his possession, and where he was not detained or sought to be detained by the other, would not constitute false imprisonment. No person disputing the right of possession of another of an article of personal property, and going into a struggle to fight for it, is, when his object is the possession of the property and not the detention or restraining of the persons so in the possession, guilty of false imprisonment; so that if you find that G. E. McClure disputed the right of possession of the barrel with Wolverton and entered into a contest with him for the possession of the same, and his object was the possession of the barrel and not the detention of Wolverton, and that Wolverton's person was not by him either detained or sought to be detained, you will find him not guilty, and this, though it should appear that Wolverton of his own free will remained upon the ground for the purpose of better asserting his claim to the barrel." *McClure v. S.*, 26 App. 102.

## CH. 6.—OF KIDNAPPING AND ABDUCTION.

§895, Art. 521 to §902, Art. 527. See Penal Code.

## CH. 7.—RAPE.

§903 to §905, Art. 528. See Penal Code.	§919. Decisions as to attempt. <i>Annotated.</i>
§905a. Charge of the court. <i>Annotated.</i>	
§906, Art. 529 to §918, Art. 535. See Penal Code.	

### §905a. Charge of the court.

The first count in the indictment in this case charged a rape upon a female over the age of ten years, and the second count charged a rape upon a female under the age of ten years. Under preponderating proof of consent and non-penetration, but conflicting proof as to the age of the female, the trial court charged the jury as follows: "But if you believe from the evidence that there was not such penetration; but that defendant made an assault upon Hattie Gray, not with intent to commit rape upon her, but with intent to have sexual intercourse with her, with her consent, then you will find the defendant guilty of an aggravated assault," etc. *Held*, abstractly correct, but, in view of the evidence, erroneous in that it did not direct an acquittal if the jury believed from the evidence that the female consented to the sexual act, and was over the age of ten years.

Upon the issues of rape and consent the trial court charged the jury as follows: "If you believe from the evidence that the defendant did, as charged, have carnal knowledge of the said Hattie Gray, but have a reasonable doubt whether such carnal knowledge was obtained with her consent, the defendant should be acquitted, unless you believe beyond a reasonable doubt that Hattie Gray was under ten years of age; in which event consent makes no difference." *Held*, that the charge, in view of the evidence which clearly disproved carnal knowledge, was erroneous, because it rested the defendant's right to acquittal upon a hypothesis eliminated by the proof.

The charge is otherwise erroneous in that, under the proof, it failed to instruct the jury in substance that defendant should be acquitted of assault to rape or aggravated assault if the female was not under the age of ten years and consented to the act of the defendant. *Taylor v. S.*, 24 App. 299.

### §919. Decision as to attempt.

Attempt to rape, as that offense is defined by article 535, of the Penal Code, is an offense distinct from rape or assault with intent to rape, and comprehends

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elements different from those which combine to constitute either of those offenses.

The indictment in this case charged, in the first count, an assault with intent to commit rape, and in the second count an attempt to commit rape. The State elected to prosecute upon the second count, and the conviction was had under that count. One of the grounds relied upon in the motion to quash the second count was that there can be no conviction for attempt to rape except on a trial for the specific offense of rape. *Held*, that the motion to quash was properly overruled, an attempt to rape being a substantive offense for which an indictment may be found and a conviction had. *Melton v. S.*, 24 App. 284.

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CH. 8.—OF ABORTION.

§920, Art. 536 to §927, Art. 541. See Penal Code.

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CH. 9.—ADMINISTERING POISONOUS AND INJURIOUS POTIONS.

§928, Art. 542 to §932, Art. 545. See Penal Code.

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CH. 10.—OF HOMICIDE.

§933, Art. 546 to §942, Art. 551. See Penal Code.

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CH. 11.—OF JUSTIFIABLE HOMICIDE.

§943, Art. 552 to §963, Art. 570. See Penal Code.	§972. In case of theft by night. <i>Annotated.</i>
§963a. Mistreating defined. <i>Annotated.</i>	§973. See Penal Code.
§964, Art. 571 to §968, Art. 575. See Penal Code.	§974. In defense of property. <i>Annotated.</i>
§969. Right of self-defense. <i>Annotated.</i>	§975 to §982. See Penal Code.
§970. Self-defense under article 570. <i>Annotated.</i>	§983. Threats made by deceased. <i>Annotated.</i>
§971. See Penal Code.	§984 and §985. See Penal Code.
	§936. Charge of the court. <i>Annotated.</i>

§963a. Mistreating defined.

To assault a person is to mistreat him; but a mere assault is not always violence, within the meaning of subdivision 6, of article 570. *High v. S.*, 26 App. 545.

§969. Right of self-defense.

Under the law of this state a person has the right to defend himself against any assault or threatened assault upon his person calculated to inflict death or serious bodily injury, and it is not essential to his perfect right of self-defense that the danger be real or actually exist, if it be apparent. If it reasonably appears from the circumstances of the case that danger existed, the person threatened with such apparent danger has the same right to defend against it, and to the same extent, that he would have if the danger was real.

But if a party by his own wrongful act brings about the necessity of taking the life of another to prevent being killed himself, he cannot justify upon the ground of necessary self-defense, and the killing will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or the malice from which it was done. The rule is that a person cannot avail himself of a necessity which he has willfully and knowingly brought upon himself.

**Perfect and imperfect self-defense—Charge of the court.**—The rule as to perfect self-defense is, however, limited by the intention of the party producing the necessity to take life. If his intention was not *felonious*, then the homicide which his necessity compelled will not be murder. When, therefore, the evidence on a trial for murder is such as is calculated to raise a question as to the character of the intent with which the difficulty was provoked by the accused, it becomes the duty of the trial court to instruct the jury fully as to the distinction between perfect and imperfect self-defense.

The doctrine has been established in this state that where there are more assailants than one, the slayer has the right to act upon the hostile demonstrations of either, and to kill either, if it reasonably appeared to him that they were present, acting together to take his life or do him serious bodily injury. The doctrine is also well established that the "right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act, unheralded and unaccompanied by any demonstrations, verbal or otherwise, indicative of the wrongful purpose." But see the opinion *in extenso*, and the statement of the case, for evidence held to demand of the trial court a charge upon both perfect and imperfect self-defense.

**Manslaughter—Adequate cause.**—An illegal attempt to restrain a person of his liberty, even under color of legal process, is such provocation as will reduce murder to manslaughter. See the opinion for substance of evidence held to raise the issue of illegal restraint, and, therefore, to demand of the trial court a correct charge thereon. Note also that, under the evidence of this case, the trial court should have instructed the jury upon the defense of manslaughter as predicated upon a killing under the influence of terror produced by an adequate cause. *Menley v. S.*, 26 App. 274.

**Conflict of evidence—Charge of the court.**—The trial being for an assault with intent to murder, and the proof conflicting as to whether the accused inflicted the injury, the trial court charged the jury, by request, as follows: "If you have a reasonable doubt as to whether the defendant was the person who shot Matt Webb, you should acquit him. If you are satisfied beyond a reasonable doubt that defendant was the person who shot Matt Webb, and have a reasonable doubt as to whether, at the time of shooting Matt Webb, defendant had a specific intent to kill said Matt Webb, or that he was acting in the defense of Anderson Rider, under the law of self-defense as given in the main charge, you will find defendant not guilty." Held, that the charge was correct, as responsive to the proof in the case. *Rider v. S.*, 26 App. 334.

Homicide in necessary self-defense is justifiable when committed to prevent murder, maiming, or serious bodily injury (and certain other offenses); but "the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death or some serious bodily injury." A person thus attacked is not bound to retreat, nor to resort to other means of prevention, before slaying his assailant.

If the attack was not made with a deadly weapon, and the slayer, in resisting it, killed his assailant with a deadly weapon, a nice question is likely to arise as to whether the homicide was culpable or justifiable. See the opinion *in extenso* for hypothetical facts and considerations affecting this question, and for an exposition of the law in such cases.

Among the conditions annexed by article 570, of the Penal Code, to the right of self-defense in prevention of the offenses therein named, it is provided that the killing must take place before the offense committed by the party killed "is actually completed,"—except in certain specified cases, among which are maiming, disfiguring, or castration, in which "the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense." *High v. S.*, 26 App. 545.

Where the defendant sought an interview with the deceased, for the purpose of demanding payment of a debt, and with no hostile intentions towards the de-

ceased, and the deceased becoming angry an altercation ensued during which the deceased drew a pistol and assaulted defendant with it in such a manner as to create in the mind of defendant a reasonable apprehension of death, or serious bodily injury, and acting upon such reasonable apprehension defendant fired the fatal shot, he was justifiable on the ground of necessary self-defense. *Bonnard v. S.*, 25 App. 173.

If one willingly enters into a deadly conflict, or provokes the contest or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the conflict. *Allen v. S.*, 24 App. 216.

**Charge of the court.**—Among the well established rules which, under our practice, apply to the charge of the court, are the following: 1. The charge of the court is always sufficient if it distinctly sets forth the law applicable to the evidence; and it is only necessary to give such instructions as are applicable to every legitimate deduction to be drawn from the facts in proof. 2. The charge must be tested by the evidence. 3. If, in homicide cases, the issue of self-defense is not fairly raised by the evidence, no charge upon that issue should be given. 4. In the absence of evidence tending to establish, or to raise a doubt, as to whether the homicide be of a lower grade than murder, it is unnecessary and improper for the court to charge upon manslaughter. See the opinion in *extenso* and the statement of the case for evidence held not to raise the issues of manslaughter or self-defense; wherefore the omission of the trial court to charge upon those issues was not error.

The doctrine of self-defense, which applies to a defensive, and not an offensive act, and which is limited to necessity, and cannot exceed the bounds of mere defense and prevention, will not avail a slayer who, by his own wrongful act, brought about the affray or produced the necessity for taking the life of the person slain, in order to protect his own life. In other words, if a person voluntarily engages in a combat, knowing that it will or may result in death, or some serious bodily injury that may produce the death of his adversary or himself, he cannot claim that he acted in self-defense. Note a state of case to which the rule applies. Note also that the evidence does not present the doctrine of imperfect self-defense. *Thum v. S.*, 24 App., 667.

#### §970. Self-defense under article 570.

**Murder—Self-defense—Charge of the court—Cases approved.**—In regulating the right to take life in necessary self-defense, the Code of this state establishes an essential distinction, based upon the nature and severity of the unlawful attack, and discriminates it into two classes. The first class, regulated by article 570, of the Penal Code, comprises all cases in which, from the acts of the assailant, or his words coupled therewith, it is reasonably apparent that his intent is to murder or do serious bodily harm, in which case the assaulted party may lawfully slay his aggressor while he is committing the offense, or when he has done some act evidently showing his intention to commit it. The second class, regulated by article 572, of the Penal Code, comprises those cases in which the purpose or intent reasonably indicated by the unlawful and violent attack is other than those above mentioned. The proof on this, as on the former trial of this case, shows that if the deceased made any attack on the accused, it was a murderous attack, which came clearly within the provisions of article 570, of the Penal Code, and there was no evidence whatever tending to show a milder attack. In this state of the proof the trial court erred in charging the provisions of article 572, because such charge, being unauthorized by the proof, was calculated to confuse and mislead the jury. [Note the opinion for the approval on the subject of *Orman's* case, 22 Texas Court of Appeals, 604, and *Kendall's* Case, 8 Texas Court of Appeals, 569.] *Orman v. S.*, 24 App. 465.

**Homicide in the prevention of arrest.**—Homicide to prevent arrest, even though the attempted arrest be lawful, is justifiable if the arrest is attempted in such a wanton and menacing manner as to threaten the accused with loss of life or serious bodily harm.

**Charge of the court.**—A killing committed in the prevention of an illegal arrest is ordinarily a homicide of no higher degree than manslaughter. See the opinion for a state of case to which the foregoing rules apply; wherefore the omission of the trial court to give them in charge to the jury was material error.

**Self-defense.**—See the opinion and the statement of the case for proof under which the charge of the court erroneously made the accused's right of self-defense depend upon whether or not he was the person named in the *capias*, and whether the deceased was making, or had made, an unlawful attack upon him. *Jones v. S.*, 26 App. 1.

**§972. In case of theft by night.**

**Term defined.**—"Night time," as that term must be construed within the purview of our statutes relating to burglary and theft, is any time between thirty minutes after sunset and thirty minutes before sunrise. Evidence was adduced on this trial to support the theory of the defense that the homicide was committed in the prevention of theft at night, but the proof as to whether the homicide occurred before or after thirty minutes after sunset was conflicting. Held, that in this state of the proof the omission of the trial court to define *night time*, in its charge to the jury, was material error. *Laws v. S.*, 26 App. 643.

**Justifiable homicide.**—Under the law homicide is justifiable when inflicted for the purpose of preventing theft at night, and the homicide in such case may be committed at any time while the offender is at the place of the theft, or within the reach of gun shot of such place. *Laws v. S.*, 26 App. 643.

**Malice.**—A homicide, though committed while the deceased was committing a theft at night, would not be justified if the killing was in fact done upon malice, and not to prevent theft or the consequences of theft at night; and a charge of the court conforming to this doctrine is not error. *Laws v. S.*, 26 App. 643.

**§974. In defense of property.**

The first of two words deducible from the statutes (Penal Code, Arts. 572, 575), defining justifiable homicide in the defense of property, may be stated as follows: If the attack upon the property is such as to produce in the mind of the owner (or person interfering) a reasonable apprehension or fear of death or serious bodily harm to the owner or person interfering, either may act at once, without resorting to other means to prevent the attack or protect the property. But if the property of the owner is attacked, and not in such manner as to endanger life, etc., every effort must be made to repel the aggression in order to justify the homicide.

But if, as in this case, the deceased undertook to seize and take the property of the accused in an unlawful manner, and in so doing aroused the passion of the accused to such an extent as to render his mind incapable of cool reflection, and to rebut the presumption of malice, the killing would be manslaughter only, though the accused did not resort to all other means to prevent the seizure of the property. The charge of the court does not submit this phase of case, though made by the proof, wherefore it is insufficient and erroneous. *Ledbetter v. S.*, 26 App. 22.

**§983. Threats made by deceased.**

It is a settled rule of practice in this state that if a person accused of culpable homicide has been threatened by the deceased with death or serious bodily injury, and such threat has, prior to the homicide, been communicated to the defendant, and at the time of the homicide the deceased by any act manifested an intention to execute such threat, the defendant would be authorized to act upon appearances in resorting to any means to protect himself, and a killing under such circumstances would be justifiable homicide. In view of the proof in this case, the failure of the trial court to give this rule in charge to the jury was error. *Alexander v. S.*, 26 App. 260.

**§986. Charge of the court.**

The following charge asked by the defendant was held to be substantially correct as matter of law, and responding to the proof, should have been given: "If Jim Jones, defendant in this case, believed, and had reasonable ground to believe, or for such belief, at the time he shot the deceased, Tom Nowlin (if you find he shot him), that he, defendant, Jim Jones, was being unlawfully arrested, that is, arrested without lawful authority, and that the life or person of him, defendant, Jim Jones, was in immediate serious danger thereby, and the acts done by the defendant, Jim Jones, were necessary to prevent such unlawful arrest of him, the said Jim Jones, and without a resort to such extremity, the said unlawful arrest could not have been prevented, and the deceased had not, in fact, any lawful authority to make such arrest, then the homicide was in law justifiable, and you will acquit the defendant." *Jones v. S.*, 26 App. 1.

## CH. 12.—OF EXCUSABLE HOMICIDE.

§987, Art. 576 and §989, Art. 577. See Penal Code.

## CH. 13.—HOMICIDE BY NEGLIGENCE.

§990, Art. 578 to §1004, Art. 592. See | §1005. Decisions relating to negligent homicide. *Annotated.*  
Penal Code.

§1005. Decisions relating to negligent homicide.

**Negligent homicide—Charge of the court.**—Three elements concur to constitute negligent homicide of the second degree: 1. The killing must have occurred in the performance of an illegal act. 2. There must have been an apparent danger of causing the death of the person killed or some other. 3. There must have been no apparent intention to kill, and the homicide must have been the consequence of the act done or attempted to be done. See the opinion and the statement of the case for evidence *held* to raise the issue of negligent homicide of the second degree, and to have demanded of the trial court a charge upon that issue. *Howard v. S.*, 25 App. 686.

Negligence by omission consists in the omission to perform an act with the performance of which the party is especially charged, and there can be no criminal negligence in the omission to perform an act which it is not the express duty of the party to perform. Under this rule brakemen on a railway train, whose duty is shown to pertain in no degree to the operation of a locomotive, nor to the watching of the railway track, nor the sounding of the danger signal, cannot be held liable for the killing of a person by the locomotive, operated by the engineer and fireman, upon whom the duty of operating it exclusively devolved. See the statement of the case for evidence *held* insufficient to support a conviction for negligent homicide. *Anderson v. S.*, 27 App. 177.

## CH. 14.—OF MANSLAUGHTER.

§1006, Art. 593 to §1017, Art. 602. See Penal Code.	§1024. Provoking contest with intent to kill; decisions as to. <i>Annotated.</i>
§1018. Adequate cause; decisions as to. <i>Annotated.</i>	§1025. Mutual combat; decisions as to. <i>Annotated.</i>
§1019 to §1021. See Penal Code.	§1026 to §1029. See Penal Code.
§1022. Insulting words, etc., to female relative. <i>Annotated.</i>	§1030. Charge of the court. <i>Annotated.</i>
§1023, Art. 603. See Penal Code.	§1031, Art. 604. See Penal Code.

§1018. Adequate cause; decisions as to.

Any condition or circumstance which is capable of creating sudden passion, rendering the mind incapable of cool reflection, may be "adequate cause," and where the evidence shows a number of conditions or circumstances tending either singly or collectively to show "adequate cause," the jury should not be restricted by the charge to a consideration of a single condition or circumstance, but should be directed to consider them all in determining the question of "adequate cause." The proof in this case shows (besides insulting language used by the deceased about the mother and sister of the defendant) that the deceased, for several hours preceding the killing, was searching for the defendant with the avowed intention of killing him on sight, and that he was armed with a pistol with which he declared his intention to kill the defendant. *Held*, that in confining the "adequate cause" to the insulting language, and in failing to submit to the jury whether the said acts and threats of the deceased (which were proved to have been communicated to the defendant), of themselves, or in connection with the

insulting language, were not "adequate cause," the charge of the court on the issue of manslaughter was erroneous. *Orman v. S.*, 24 App. 495.

Manslaughter, under our law, is predicated upon adequate cause, and unless adequate cause exists the homicide will not be reduced from murder, though committed under the immediate influence of sudden passion rendering the mind incapable of cool reflection. See the statement of the case for evidence *held* not to demand of the trial court a charge upon manslaughter, because it clearly demonstrates the non-existence of adequate cause. *Clore v. S.*, 26 App. 624.

Article 602, of the Penal Code, provides that, "in order to reduce a voluntary homicide to manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to in the third sub-division of article 594 (anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection), but also that such state of mind did actually exist at the time of the offense." Article 603 provides that "though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provoked a contest with the apparent intention of killing, or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter." The trial court in this case charged the jury literally the language of the said articles, and, under the proof, the charge was sufficient. *Johnson v. S.*, 26 App. 631.

The trial court erred in this case in failing to affirmatively charge the jury as to the threats to the character of the deceased, and his conduct at the time of the homicide, in order that the jury might have considered the same in determining whether or not "adequate cause" for the homicide existed.

The trial court having charged the jury as to the law in case the evidence showed that the defendant provoked the contest with the deceased with the intent to kill him, it should have gone further, in view of the proof, and instructed them as to the law in case he provoked the contest with no intent to kill, and the omission to do so was error. *Alexander v. S.*, 25 App. 260.

In a trial for assault with intent to murder, the trial court charged the jury that "an assault and battery so slight as to show no intention to inflict pain or injury is not, in law, deemed an adequate cause." *Held* that, although abstractly correct, the charge, in view of the proof which showed that the injured party struck the defendant, with a manifest intention to injure him, before the defendant made the assault, was material error.

The proof leaving it in doubt whether or not a blow inflicted by the injured party upon the defendant, causing pain and bloodshed, was inflicted before the assault by the defendant, the trial court erred in refusing an instruction to the effect that if the jury should find that the blow causing the pain and bloodshed was inflicted before the assault, it would be "adequate cause." *Williams v. S.*, 25 App. 216.

Of the four "adequate causes" for the "sudden passion" characteristic of manslaughter, the Penal Code, in article 597, enumerates two, as follows: 1. An assault and battery by the deceased causing pain or bloodshed; and, 2. A serious personal conflict in which great injury is inflicted by the person killed by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, *provided*, such aggression was not made with intent to bring on a conflict for the purpose of killing. But the preceding article 596 enacts that "an assault and battery so slight as to show no intention to inflict pain or injury" is not an adequate cause. *High v. S.*, 26 App. 545.

#### §1022. Insulting words, etc., to female relative.

Under the law, insulting words applied by the deceased to the wife of the slayer will reduce a homicide from murder to manslaughter, *provided* the killing occurred at the first meeting of the slayer and the deceased after the former was informed of the insult to his wife, *and, provided further*, that the insult was the *real* cause of the killing. But see the opinion and the statement of the case for evidence *held* sufficient to warrant the jury in finding that the insult was not the real cause of the killing, and, therefore, the conviction for murder in the second degree is sustained. *Norman v. S.*, 26 App. 221.

To raise the issue of manslaughter it must be shown that the killing occurred at the first meeting of the parties after the accused was informed of the slanderous language, and this rule applies to an accomplice. *Parker v. S.*, 24 T. 61.

When the adequate cause relied upon to reduce murder to manslaughter is insulting language by the person slain towards the female relative of the slayer, it is error for the trial court to give in charge to the jury the provisions of article 594 of the Penal Code, to the effect that the provocation must arise at the time of the killing, and that the passion must not be the result of a previous provocation. On the contrary, the jury in such cases should be instructed that the time intervening between the slayer's appraisal of the insult and his first meeting with deceased, is not a material consideration, *provided*, the adequate cause be shown, and the state of the slayer's mind, predicated thereon, did actually exist at the time of the killing.

It is not essential, though proper, that the charge of the court should instruct the jury in the forms of verdicts which may be rendered by them; but, when such an instruction is given, it should embrace every verdict which might be rendered in the case. *Williams v. S.*, 24 App. 637.

#### §1024. Provoking contest with intent to kill.

Two rules may be evolved from the statutes bearing upon the culpability of an accused who, having produced the occasion, slays his antagonist in the combat: 1. If he provoked the difficulty or produced the occasion, in order to obtain a pretext to kill the deceased or do him some serious bodily harm, the killing will be murder, no matter to what extremity the slayer may have been reduced in the combat. 2. But if he provoked the difficulty or produced the occasion without any felonious intent—intending, for instance, an ordinary battery—the final killing in self-defense will be manslaughter only. See the opinion for a charge of the trial court *held* erroneous because there was no evidence adduced upon the trial tending to show that the accused provoked the combat for the purpose of killing or in any manner injuring the deceased.

It was proved, in substance, that the defendant and a daughter of the deceased withdrew together, about eleven o'clock at night, from the house of the deceased, at which there was a social gathering, and that a short time later they were discovered by another daughter of the deceased, on the ground, a short distance from the house, copulating, with the consent of the girl, who, when discovered by her sister, fled to the house; and that a short time later the deceased came upon the scene of the recent copulation, and the shooting occurred. Under this proof the trial court charged, in effect, that every man has the right to interfere to prevent the debauchery of his minor daughter, and if the defendant, at the house of the deceased, sought to have carnal intercourse with the minor daughter of deceased, and deceased interfered to prevent such carnal intercourse, and that for such interference the defendant shot and killed him with express malice, he was guilty of murder in the first degree, and if not with express malice, he was guilty of murder in the second degree. *Held*, that the charge was erroneous and inapplicable to the proof.

Defendant requested an instruction to the effect that "even if defendant had intercourse with Ella Land, and Ella had separated from him and left the place, and then deceased, with an axe, made such an assault upon defendant as caused him reasonably to apprehend death or serious bodily injury, he would have been justifiable in killing deceased," which was refused. *Held*, in view of the evidence adduced upon the trial, the refusal to give the instruction was error. *Varnell v. S.*, 26 App. 56.

#### §1025. Mutual combat.

The trial court charged the jury as follows: "The law does not permit men to engage in mutual combat, and when two or more persons engage willingly in mutual combat, each is responsible for the consequences of his own act." *Held* correct in the abstract, but insufficient to meet the proof in the case, inasmuch as, although the proof demanded a charge upon mutual combat, the instruction does not inform the jury of what offense, in any event, the defendant could be found guilty. See the opinion on the question. *Williams v. S.*, 25 App. 216.

#### §1030. Charge of the court.

Upon the issue of manslaughter, the trial court charged the jury, in effect, that if they believed beyond a reasonable doubt that the accused killed the deceased, and that at the time of such killing he had been informed that the deceased used insulting language to his wife, and that he killed deceased at his first meeting with him after being so informed, and under the immediate influence of sudden passion arising from such information, and that such passion was sufficient to render his



mind incapable of cool reflection, they should find him guilty of manslaughter. *Held*, correct as applied to the facts in proof. *Norman v. S.*, 26 App. 221.

In view of the evidence in this case, the trial court erred in failing to instruct the jury to the effect that if the defendant did not intend to provoke a difficulty with deceased, but sought him solely for the purpose of demanding payment of a money demand, and a difficulty ensued in which defendant, on account of abuse heaped upon him by deceased, voluntarily slew the deceased in the heat of passion engendered by the abuse, in connection with previous wrongs done him by the deceased, and the circumstances, all together combined, were of such a character as to produce adequate cause sufficient to render the mind incapable of cool reflection, then the killing would be manslaughter. And, further, the trial court, under the facts of this case, should have instructed the jury to the effect that if defendant sought an interview with the deceased with no hostile intention, and deceased became enraged and committed an assault upon defendant which did inflict pain or bloodshed, and under the passion thus engendered, defendant shot and killed deceased, the pain or bloodshed would amount to "adequate cause," and the killing would be manslaughter. *Bonnard v. S.*, 25 App. 178.

Objection that the trial court charged the jury abstractly upon the issue of manslaughter cannot be entertained, inasmuch as it was not interposed when the charge was given, and no probable injury to the accused is shown. See the opinion for a charge upon homicide in defense of the person against an unlawful attack, and the statement of the case for a charge upon adequate cause, *held* sufficient, under the facts of the case. And note that the evidence does not call for a charge upon "cooling time," nor upon self-defense, wherefore the trial court did not err in omitting to charge upon "cooling time," nor refusing the special charge as to self-defense. *Miller v. S.*, 27 App. 63.

## CH. 15.—OF MURDER.

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| §1032, Art. 605 to §1034, Art. 606. See Penal Code.             | §1050, Art. 607 to §1052, Art. 608. See Penal Code.                      |
| §1035. Indictment. <i>Annotated</i> .                           | §1053. Threats by deceased. Decisions as to. <i>Annotated</i> .          |
| §1036 to §1038. See Penal Code.                                 | §1054 to §1059. See Penal Code.  |
| §1039. Implied malice defined. <i>Annotated</i> .               | §1060. Charge of the court in general. <i>Annotated</i> .                |
| §1040. See Penal Code.  | §1061 to §1063. See Penal Code.  |
| §1041. Murder in the second degree. <i>Annotated</i> .          | §1064. Degrees of homicide. <i>Annotated</i> .                           |
| §1042. See Penal Code.  | §1065 to §1068. See Penal Code.  |
| §1043. Express malice. <i>Annotated</i> .                       | §1069. <i>Alibi</i> . <i>Annotated</i> .                                 |
| §1044. See Penal Code.  | §1070. Self-defense. <i>Annotated</i> .                                  |
| §1045. Dying declarations. <i>Annotated</i> .                   | §1071. Presumption of innocence and reasonable doubt. <i>Annotated</i> . |
| §1046. <i>Res gestæ</i> . <i>Annotated</i> .                    | §1072 to §1074, Art. 609. See Penal Code.                                |
| §1047 and §1048. See Penal Code.                                |  |
| §1049. Other decisions relating to evidence. <i>Annotated</i> . |  |

### §1035. Indictment.

Indictment for murder charged that the accused "did with malice aforethought kill and murder" the deceased. The defense objects to the indictment because it does not charge that the homicide was *unlawfully* done, etc. *Held*, that the objection is without merit, and the indictment sufficient. *Jackson v. S.*, 25 App. 314. See, *post*, §1043.

It is not essential that an indictment for assault with intent to murder shall allege the means used nor the manner in which it was used to effectuate the murderous intention. *Douglass v. S.*, 26 App. 109.

Indictment is sufficient to charge a murder by express malice aforethought, and, therefore, murder of the first degree, if it charges that the accused "did, with malice aforethought, kill the deceased [naming him] by shooting him with a pistol." *Banks v. S.*, 24 App. 559.

T. 15, CH. 15.] OFFENSES AGAINST THE PERSON. §§1039-1045.

The indictment charged that "Mack Green, on or about the first day of May, 1888, in the county and state aforesaid, did, with malice aforethought, kill Sam Smith, by shooting him with a gun, contrary," etc. On motion in arrest of judgment, the indictment is *held* a good indictment for murder, and sufficient to sustain a conviction in the first degree. *Green v. S.*, 27 App. 244.

§1039. Implied malice defined.

No question of degree can enter into a murder perpetrated in the commission of the offense of rape. The fact that it was perpetrated in the commission of rape is of itself evidence that it was murder upon express malice aforethought. The indictment in this case charges a murder upon express malice aforethought, and that it was committed in the perpetration of rape. The trial court charged the jury correctly upon murder committed with express malice aforethought, but omitted to charge upon murder committed in the perpetration of rape. *Held*, that in the absence of exception or requested instructions upon the subject, the omission was not error, no prejudice to appellant appearing. *Washington v. S.*, 25 App. 387.

§1041. Murder in the second degree.

Upon a trial for murder, the trial court, at the request of the State, charged the jury as follows: "If you believe from the evidence in this cause that, at the time the fatal blow was given, the defendant did not have reasonable ground for believing, and it did not so reasonably appear to the defendant, judging from his standpoint, that he was in danger of his life, or that serious bodily harm was about to be inflicted upon him by the deceased, then he cannot be acquitted on the ground of self-defense, but a killing under such circumstances would be murder in the second degree or manslaughter; and if the killing was done under these circumstances, then you will look to the definition of murder in the second degree and of manslaughter, as the same have been herein before defined, to determine the degree of guilt." *Held*, that, considered in connection with the charge as a whole, and in the light of the evidence, this instruction was correct. *Humphries v. S.*, 25 App. 126.

§1043. Express malice.

The charge of the court defined express malice to be "where one with a calm, sedate and deliberate mind and formed design kills another," etc. *Held*, erroneous, because it omits to qualify the act as an *unlawful* killing. *Crook v. S.*, 27 App. 198. (See, *ante*, §1035.)

A charge of the court in a trial for murder which omits to define the terms "malice" and "malice aforethought"—essential elements of murder—is fundamentally erroneous, and such error is not cured by a definition of "express malice." *Crook v. S.*, 27 App., 198.

§1045. Dying declarations.

One of the essential predicates to the competency of dying declarations as evidence is that, at the time they were made, the declarant was conscious of approaching death, and had no hope of recovery. See the opinion *in extenso* and the statement of the case for a predicate totally insufficient in this respect; wherefore the declarations of the deceased were erroneously admitted in evidence as dying declarations. *Irby v. S.*, 25 App. 203.

As a predicate for the introduction in evidence of the dying declarations of the deceased, the State proved that deceased was conscious and sane when he made them; that he knew his speedy death was inevitable, and that he made the said declarations voluntarily, and not in reply to questions calculated to lead him to make any particular statement. *Held*, that the predicate was sufficient to admit the declarations in evidence as dying declarations, being made immediately after the shooting. Moreover, the statements were *res gestæ*. *Testard v. S.*, 26 App. 260.

As a necessary predicate for the admission in evidence of dying declarations it must be established that the declarant, when he made them, was under the sense of impending death, and was sane. Consciousness of approaching death is provable, not merely by the solemn protestations of the dying person, but by any circumstance which sufficiently shows that when he made the declarations he was under the sense of impending death. See the opinion and the statement of the case for evidence *held* sufficient to establish the necessary predicate for the proof of dying declarations. *Miller v. S.*, 27 App. 63.

§1046. *Res gesta.*

The defense proposed, but was not permitted to prove that, a short time prior to the shooting, the deceased was known to be making efforts to trade for a pistol. This proof, in view of the evidence, was competent as tending to explain why it was that defendant and deceased were together at the place of the shooting; why the defendant invited the deceased to that place, and why defendant had a pistol on that occasion; and, moreover, it tended strongly to throw light on the whole transaction. *Irby v. S.*, 25 App. 203.

See the statement of the case for statements made to his father by the deceased as soon as he could talk, and within twenty minutes after he received the fatal shot, and which, being clearly *res gesta*, were properly admitted in evidence for the State. *Irby v. S.*, 25 App. 203.

The physician who attended the deceased being upon the stand, the defense asked him why, during his attendance upon the deceased, he informed the deceased that he (the witness) thought that the deceased would get well. The witness replied that deceased asked him if he would recover, and that he replied that he would, whereupon the deceased said that if he did get well the defendant would "pay for this." Upon the ground that the defense had proved this part of a conversation, the State was permitted, upon cross-examination, to prove by the witness other statements of the deceased in that conversation, detailing the circumstances of the shooting. *Held*, that the question of the defense did not call for any part of the conversation between the witness and the deceased, but only for the latter's reason for assuring the former of his recovery, and this did not authorize the proof admitted for the State. *Irby v. S.*, 25 App. 203.

§1049. *Other decisions relating to evidence.*

The indictment alleged that the assault was committed with a gun, and the proof showed that it was committed with a pistol. The court instructed the jury to convict if it appeared from the evidence that it was committed with a gun or a pistol. *Held*, correct, under the general rule that there is no material variance when the instrument alleged and that proved are of the same nature and character, and capable of inflicting the same kind of wound. *Douglass v. S.*, 26 App. 109.

§1053. *Threats by deceased.*

Article 608 of the Penal Code provides that threats afford no justification for homicide, "unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threat so made." *Held*, that under a proper construction of this statute, the act done must manifest the immediate intention to execute the threat so made. It was not error, therefore, that in his charge upon this subject, the trial judge interpolated the word "immediate" to qualify "intention." See the opinion in *extenso* on the question. *Lynch v. S.*, 24 App. 350.

Proof of deadly threats made by the deceased against the accused, and that the deceased was a violent and dangerous character, and that the threats and the character of the deceased were known to the accused at the time of the homicide, can afford no justification for homicide without proof that, at the time of the homicide, the deceased did some act indicating a present intention to kill the accused or do him serious bodily harm. Neither the evidence adduced on the trial nor that foreshadowed in the application for continuance laid a predicate for proof of threats in this case, wherefore a continuance was properly refused. *Brooks v. S.*, 24 App. 274.

Antecedent menaces, former grudges and quarrels may be proved on a murder trial to show the state of mind and the malice of the accused at the time of the killing. Under this rule the State was properly permitted to prove former difficulties between the accused and the deceased, and the previous threats made by the accused against the deceased. *Howard v. S.*, 25 App. 686.

The defendant having introduced evidence of threats against his life, uttered by the deceased, a short time before the homicide, the State, over defendant's objection, was permitted to prove that, about a year before the homicide, the defendant told a witness that the "threats of John Collier (deceased) did not amount to any more than those of an old woman." *Held* that objection to this proof was properly overruled. *Miller v. S.*, 27 App. 63.

The charge of the court is erroneous in that the instruction relating to the threats uttered by the deceased against the accused is disconnected from that

portion of the charge which relates to self-defense, whereas it should have formed a part of the instruction on the law of self-defense, and should have been given in immediate connection with that issue. See the opinion *in extenso* on the subject. *Tillery v. S.*, 24 App. 251.

**§1060. Charge of the court in general.**

In a trial for murder the inculpatory evidence tended to prove that the defendant and his brother waylaid the deceased, and that he was fired upon and killed by one or both of them—both being present and acting together in perpetrating the homicide. According to the defense, the meeting of the deceased with the defendant and his brother was accidental, and the first shot was fired by the deceased at the defendant's brother, who, in self-defense, and with no co-operation of defendant, fired upon and killed the deceased. The trial court gave in charge to the jury the law of murder of the first degree, and of justifiable homicide in self-defense, but refused to give in charge the law of murder of the second degree and of manslaughter. *Held*, that the charge covered the only issues in the case, and properly omitted the law of murder of the second degree and of manslaughter. *Green v. S.*, 27 App. 244.

The evidence in this case disclosed that, at the time of the homicide, the defendant was on his way to the post-office in the town of E. As tending to show that his meeting with the deceased was unpremeditated and accidental, the defendant proposed to prove by a witness that, on the Saturday before the Monday on which the homicide occurred, he told the witness that he would meet him at the post-office in E. on the said Monday. The trial court excluded the proposed testimony, and charged the jury as follows: "The defendant had the right to go to the post-office or any other place he desired to go for a lawful purpose; but if he started to go to or by the house of the deceased merely to get an excuse to kill him, or with the intention of seeking or getting into a fatal rencontre with the deceased, and thus got into the difficulty, then the defendant cannot justify the homicide, even though his life was put in peril." *Held* that, waiving the question of the correctness of the ruling of the court in excluding the proposed evidence, the charge of the court was radical error, because it was predicated upon no evidence whatever showing a hostile intention of the defendant in going to or by the house of the deceased. The rule is that, "however correct a principle of law may be in the abstract, it is error to give it in charge if there is a total want of evidence to support the phase of case to which it is applied." *Lynch v. S.*, 24 App. 350.

The act of killing, in this case, necessarily included an assault and battery, and the charge of the court defining murder sufficiently embraced assault and battery, but the trial court, in addition, gave in charge an independent definition of assault and battery. *Held* material error, because excepted to. Moreover it was matter calculated only to incumber the charge and confuse the jury. *Crook v. S.*, 27 App. 195.

**§1064. Degrees of homicide.**

It is an established rule of practice in this state that, upon the trial of an offense which comprehends different degrees, it becomes the imperative duty of the trial court to instruct the jury upon the law applicable to every degree or grade of offense indicated by the evidence, however feeble such evidence may be; that, if there be a doubt as to which of two or more grades of the offense the accused may be guilty, the law as to all of such grades should be charged, and that the trial court should omit to charge the law of any particular grade only when it is to no extent whatever raised by the evidence. See the statement of the case for evidence adduced on the trial for murder, which, though sufficient to establish the express malice essential to constitute murder of the first degree, is not of such character as to absolutely preclude the jury from finding therefrom a killing upon implied malice, and, therefore, murder in the second degree; wherefore the omission of the trial court to instruct the jury upon the law of murder in the second degree was error.

The accused, being on trial for murder, contends that, under the law of this state, it is the duty of the trial judge, in murder cases, without regard to the evidence adduced, to instruct the jury as to the law of murder of the second degree. But *held* that, notwithstanding the apparent plausible construction of the statutes upon which the proposition is maintained, the doctrine obtains in this state that the trial court may decline to submit to the jury the issue of murder of the sec-

ond degree when the evidence wholly fails to present that issue. See the opinion *in extenso* upon the question, and note the suggestion relative to the charge in trials for murder. *Blocker v. S.*, 27 App. 16.

If, in an attempt to kill a certain person, the slayer, through mistake, kills another person, the homicide thus committed cannot be of a higher grade than murder of the second degree. If, however, the slayer had killed the person he intended to kill, and such killing, under the circumstances surrounding it, would be manslaughter, then the killing of a third person by mistake, believing him to be the person intended, would be manslaughter. The facts of this case show that, had the defendant killed the person intended, such killing would have been murder of the first degree. The evidence, therefore, does not raise the issue of manslaughter, and in omitting to instruct the jury upon that issue the trial court did not err. *Breedlove v. S.*, 26 App. 445.

#### §1069. Alibi.

The trial court is not required to charge upon the defense of *alibi*, unless it is the sole defense interposed by the accused; or unless, there being other defenses, the accused requests an instruction upon such defense; and in such case the omission to give such a charge will be revised by this court only when the charge has been specially excepted to because of such omission. *Rider v. S.*, 26 App. 334.

The only inculpatory evidence against the accused was the testimony of two witnesses to the effect that subsequent to the theft of the property they saw the same removed from a place of concealment by three parties, one of whom they believed, but were not positive, was the defendant. In anticipation of this evidence, the defendant applied for a continuance to secure a witness by whom to establish his presence at another place at the time the property was removed from the place of concealment. Being denied the continuance, and convicted, the defendant asked for new trial because of the ruling of the court upon his application for continuance. The new trial was refused upon the ground (as was the continuance) that the proposed *alibi* did not cover the time of the theft of the property. *Held*, that the action of the trial court was error, not only because of the inherent weakness of the inculpatory proof, but because an *alibi* is available, not merely to meet the main issue in the case, but any criminative fact relied upon by the State. *Taylor v. S.*, 27 App. 44.

#### §1070. Self-defense.

The evidence on a murder trial disclosed that for a period long anterior to the homicide the deceased was at enmity with the accused; that he had repeatedly, without apparent, probable or reasonable cause, charged the accused with a felony; that he had threatened to kill the accused; that he had conspired with one T. to kill the accused, and that, at the time of the homicide, he was acting together with T. in pursuance and furtherance of said conspiracy; that he and T. made an unsuccessful attempt on the night before the homicide to induce other parties to co-operate with them in the murder of the accused on that night, of which effort on the part of the deceased and T. the accused, on the same night, was informed; that on the next morning, immediately after a conference with T., the deceased, armed with a pistol, accosted the accused and again charged him with a felony; that the accused thereupon demanded that the charge be retracted by the deceased, when the deceased placed his right hand to his right side (where his pistol was afterward found), and the accused fired the fatal shot. *Held*, that the evidence fairly raised the issue of self-defense, and authorized the court to charge the jury upon that issue; but that, as there was no evidence tending to show that the accused had forfeited his right of self-defense by seeking and provoking the difficulty, the charge upon that issue was not authorized by the proof, was prejudicial to the accused, and was, therefore, erroneous.

The rule prescribing the extent to which a person in emergency is authorized to act upon appearances of danger is as follows: If, from the standpoint of the slayer, it reasonably appeared to him, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent, and under the same rules, as if the danger had been real. The charge in this case was erroneous, in that it limited such right of the accused to his *honest belief* that he was in danger, and erroneously made this idea prominent by reiteration. *Tillery v. S.*, 24 App. 251.

T. 15, CHS. 16, 17.] OFFENSES AGAINST THE PERSON. §§1071-1082a.

§1071. **Presumption of innocence and reasonable doubt.**

The defense interposed to this prosecution was that the deceased fired the fatal shot and killed herself. Upon that issue the trial court charged as follows: "If, from the evidence, you believe that Anna Smith took her own life, and that the fatal shot which deprived her of life was not fired by the defendant, but by her own hand, or by any other means than the act of the defendant, then he is not guilty, and you should so find." *Held*, that the charge was erroneous because it imposed upon the accused the burden of proving his innocence. The instruction should have been to the effect that if, from all the evidence, the jury entertained a reasonable doubt whether the defendant killed the deceased, or whether the deceased killed herself, they should acquit him. *Shamburger v. S.*, 24 App. 433.

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CH. 16.—OF DUELING.

§1075, Art. 610 to §1077, Art. 611. See Penal Code.

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CH. 17.—GENERAL PROVISIONS RELATING TO  
HOMICIDE.

§1078, Art. 612. See Penal Code.

§1079. Decisions relating to preceding article. *Annotated.*

§1080, Art. 613 to §1082, Art. 614. See Penal Code.

§1082a. Decisions relating to preceding article. *Annotated.*

§1083 and §1084, Art. 615. See Penal Code.

§1079. Means or instruments used must be considered. See *Nichols v. S.*, 24 App. 137.

§1082a. **If in sudden passion not with deadly weapon.**

If a homicide be committed under the influence of sudden passion, by the use of means not in their nature calculated to produce death, and in the absence of an intention to kill, the circumstances not showing an evil or cruel disposition, the party killing would not be guilty of culpable homicide, but, self-defense apart, would be guilty of some grade of assault and battery. See the opinion for a discussion of the articles of the Penal Code relating to manslaughter.

The proof in this case raising the questions whether or not the accused intended to kill the deceased, and whether or not the means used were in their nature calculated to produce death, the trial court should have given to the jury instructions appropriate to those issues. *Thompson v. S.*, 24 App. 383.

T. 16, CHS. 1-3.] OFFENSES AGAINST REPUTATION. §§1119a, 1121.

## TITLE 16.—OF OFFENSES AGAINST REPUTATION.

### CH. 1.—OF LIBEL.

§1085, Art. 616 to §1117, Art. 644. See Penal Code.

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### CH. 2.—OF SLANDER.

§1118 and §1119, Art. 645. See Penal Code.	§1120, Art. 646. See Penal Code.
§1119a. Information. <i>Annotated.</i>	§1121. Evidence. <i>Annotated.</i>
	§1122. See Penal Code.

#### §1119a. Information.

The information in this case sets forth the alleged slanderous words in the English language. Over the objection of the defendant, the State was permitted to prove slanderous words which were uttered by the defendant in the German language, and that the said words, interpreted, mean substantially the same as the English words alleged. *Held*, that the admission of the proof was error. The rule is, in civil cases, and *a fortiori* in criminal cases, that if the slanderous words were spoken in a foreign language they must be set forth in such language, together with a translation into English. *Stichtd v. S.*, 25 App. 420.

#### §1121. Evidence.

Indictment, to charge slander by imputing want of chastity to a female, must substantially set forth the language or whatever else constitutes the imputation of want of chastity, and the evidence, to be sufficient under such an indictment, must prove the allegation substantially as laid. The allegations that the accused said that "S. M. was unchaste and not virtuous," and that he "could at any time have seminal and carnal intercourse with her if an opportunity presented itself," though sufficient to charge slander, are not supported by proof that he said: "The whole M. family are whores," and that on "one occasion he could have had carnal intercourse with S. M. if he had had an opportunity." *Frisby v. S.*, 26 App. 180.

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### CH. 3.—OF FALSE ACCUSATION AND THREATS OF PROSECUTION.

§1123, Art. 647 to §1126, Art. 650. See Penal Code.

## TITLE 17.—OF OFFENSES AGAINST PROPERTY.

### CH. 1.—OF ARSON.

§1127, Art. 651. See Penal Code.	§1130, Art. 653 to §1140, Art. 662. See Penal Code.
§1128. Indictment. <i>Annotated.</i>	§1141. Evidence. <i>Annotated.</i>
§1129, Art. 652. House defined. See Penal Code.	§1142 and §1143, Art. 663. See Penal Code.
§1129a. Decisions on the preceding article. <i>Annotated.</i>	

#### §1128. Indictment.

Indictment described the burned building as "the house of Mary Gandy there situate in the town of Granbury, said Hood county, Texas, and the said house being then and there held and occupied by C. M. Rogers for and as the agent of J. M. Rogers, said J. M. Rogers having theretofore, on about the second day of November, 1881, rented and leased said house from the said Mary Gandy by and through J. M. Skipper as the agent of her, the said Mary Gandy." The defense excepted to the indictment on the grounds that the description of the house was uncertain, and the averments of its ownership and occupancy uncertain, inconsistent and repugnant. *Held*, that the exceptions were correctly overruled, and that it would have sufficed to have described the building as the house of C. M. Rogers, or a house occupied by C. M. Rogers, situated in the town of Granbury, in Hood county, State of Texas. The averments of the ownership of Mary Gandy and the lease to J. M. Rogers were unnecessary and required the State to prove them, but their redundancy does not vitiate the indictment. *Rogers v. S.*, 26 App. 404.

In the first count of an indictment for arson, the appellant was charged with burning his own house which was "then and there insured." In the second count it was charged that he burned his own house, endangering thereby the safety of houses belonging to other persons. The *locus in quo* is described in both counts as "a certain house then and there occupied, owned and controlled by him, the said Baker." *Held*, that this allegation is sufficient, inasmuch as the words "then and there" have definite reference to the date and the county previously alleged in the counts. It was not necessary that the first count should allege the amount of the insurance nor the company in which the house was insured. Nor was it necessary that the second count should allege who were the owners of the houses alleged to have been endangered by the burning of the defendant's house, provided they were not the property of the defendant himself. *Baker v. S.*, 25 App. 1.

#### §1129a. Decisions under article 652.

"House," as that term is defined by our statute denouncing the offense of arson, is "any building or structure inclosed within walls and covered, whatever may be the materials used for building." Arson, as defined by the statute, is the willful burning of any house included within the meaning of the term "house" as above defined. The indictment in this case charged the burning of a house. The proof showed that the accused, then a tenant and occupant of the premises, first demolished the house and then burned the material of which it had been constructed. *Held*, that the proof was insufficient to support the conviction for arson. *Mulligan v. S.*, 25 App. 199.

#### §1141. Evidence.

In a trial for arson, the defense objected to the admission of oral evidence adduced by the State to prove the alleged ownership of the burned house, but the objection was overruled and the testimony admitted. It appears, however, that the same fact was proved by other evidence, to which no objection was made by the defense, and that the defendant occupied the house under a lease from the owner. *Held* that, in view of this proof, there was no material error in overruling the objection to the oral proof of the ownership. *Rogers v. S.*, 26 App. 404.

**Expert testimony.**—In the trial of appellant for the arson of a house wherein he conducted for his father a grain and feed store, it was in proof that he had procured in his father's name an insurance on the stock to a much larger amount



than its value when burned, and a State's witness testified that he was hired by the appellant to burn the house, and did set it on fire, and that the appellant, previous to the fire, told him that he intended to swindle the insurance company, and that he was fixing his books for that purpose, and had them nearly ready. Over defendant's objections the State was permitted to produce an account book, and to prove that it was a book used by defendant in his business, and that certain entries therein were in his handwriting, and was then allowed to prove by an expert book-keeper the meaning of the entries, which were mercantile and ambiguous. The objections were that neither the purpose nor the date of the entries was proved; that the entries themselves were irrelevant, and that expert evidence is not competent to prove that an entry means one thing when it may mean another or nothing. *Held* that, in view of the other evidence, there was no error in overruling the objections and admitting the entries and the expert's explanation of them. But *held*, further, that the court below erred in excluding evidence offered by the defendant, which tended to repel the inculpatory inferences deducible from the said entries. [See the opinion for the excluded evidence.] *Rogers v. S.*, 26 App. 404.

## CH. 2.—OF OTHER WILLFUL BURNING.

§1144, Art. 684 to §1156b, Art. 675b. See Penal Code.

## CH. 3.—MALICIOUS MISCHIEF.

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| <p>§1157, Art. 676 to §1174, Art. 682. See Penal Code.</p> <p>§1175, Art. 683. Destroying fruit, etc., or real or personal property. <i>Amendment.</i></p> <p>§1176. Decisions under preceding article. <i>Annotated.</i></p> <p>§1177, Art. 683a. See Penal Code.</p> <p>§1177a, Art. 683b. Throwing a missile, etc., into a coach or car of a railway train. <i>New.</i></p> <p>§1178, Art. 684. Injuring fence, etc. See Penal Code.</p> | <p>§1179. Decisions under preceding article. <i>Annotated.</i></p> <p>§1180, Art. 684a. See Penal Code.</p> <p>§1180a, Art. 684b. Removal of a fence without consent or notice, an offense. <i>New.</i></p> <p>§1180b, Art. 684c. Failure to give notice of intention to withdraw or separate fence. <i>New.</i></p> <p>§1180c, Art. 684d. Failure to give notice to another to withdraw or separate fence. <i>New.</i></p> <p>§1181, Art. 685 to §1192, Art. 691c. See Penal Code.</p> |
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### §1175—Art. 683.—Destroying fruit, etc., or real or personal property.

If any person shall willfully and mischievously injure or destroy any growing fruit, corn, grain, or other like agricultural products, or if any person shall willfully or mischievously injure or destroy any real or personal property of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against property otherwise provided for by this Code, he shall be punished by fine not exceeding one thousand dollars; *provided*, that when the value of the property injured is fifty dollars or less, then in that event he shall be punished by fine not exceeding two hundred dollars. [Amendment March 22; July 6, 1889; 21 Leg. p. 35.]

**§1176. Decisions under preceding article.**

This prosecution, for injuring and destroying a set of buggy harness, was based upon the original article 683 of the Penal Code. To come within the provisions of that article, the property injured or destroyed must be an agricultural product or property; within which description a set of buggy harness does not come; wherefore the motion to quash the indictment should have prevailed. *Menges v. S.*, 25 App. 710.

**§1177a—Art. 683b.—Throwing a missile, etc., into a coach or car of a moving railway train.**

That any person who shall willfully or maliciously throw a stone or other missile, or fire a gun or pistol at or into any coach or passenger car of a moving railway train, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum of not less than twenty-five dollars and not more than one thousand dollars. [Act March 22; July 6, 1889; 21 Leg. p. 35.]

**§1179a. Decisions as to willfully pulling down fence.**

Under our law a tenant in possession of leased premises is the owner thereof until the expiration of the lease, and may, during such time, make any legitimate use of the premises, such as opening a convenient passway in a fence, when such passway does not expose the growing crops of the owner of such fence to depredation by stock. See the opinion for the substance of evidence held insufficient to support a conviction for willfully pulling down a fence, etc.

To charge the offense of pulling down and injuring a fence which belongs to two or more owners, an information must negative the consent of *each* owner. The information in this case fails to negative any consent, and is fatally defective. *Govitt v. S.*, 25 App. 419.

**§1180a—Art. 684b.—Removal of fence without consent or notice, an offense.**

Hereafter it shall be unlawful for any person who is a joint owner of any separating or dividing fence, or who is in any manner interested in any fence attached to or connected with any fence, owned or controlled by any other person, to remove the same except by mutual consent, or as hereinafter provided. [Act April 6, 1889, §1; 21 Leg. p. 45.]

**§1180b—ART. 684c.—Failure to give notice of intention to withdraw or separate fence.**

Any person who is the owner or part owner of any fences connected with or adjoined to any fences owned in part or in whole by any other person, shall have the right to withdraw or separate his fence or part of fence from the fence of any other person or persons in this state; that such person who desires to withdraw or separate such fence from the fence of any other person shall give notice in writing to such person, his agent, attorney, or lessee, of his intention to separate or withdraw his fence or part thereof for at least six months prior to the time of such intended withdrawal or separation. Any person failing to comply with the provisions of this section shall be fined in any sum not less than two dollars nor more than fifty dollars, and every ten days shall constitute a separate offense for the violation of this act. [Act April 6, 1889, §2; 21 Leg. p. 45.]

**§1180c—ART. 684d.—Failure to give notice to another to withdraw or separate fence.**

Any person who is the owner of any fence wholly upon his own land, to which the fence of another is adjoined or connected in any manner, may require the owner of any such fence to disconnect and withdraw the same back on his own land by first giving notice in writing for at least six months to such person, his agent, attorney, or lessee, to disconnect and withdraw his fence back on his own land. Any person who shall negligently or willfully fail to disconnect his fence and remove the same back upon his own land after the expiration of said notice, shall be fined in any sum not less than ten nor more than fifty dollars, and each ten days' failure after such notice shall constitute a separate offense for the violation of the provisions of this act. [Act April 6, 1889, §3; 21 Leg. p. 45.]  
See Civil Statutes, Art. 2535b.

**CH. 4.—OF INFECTIOUS DISEASES AMONG ANIMALS.**

§1193, Art. 692 to §1200, Art. 696. See Penal Code.

**CH. 5.—OF CUTTING AND DESTROYING TIMBER.**

§1201, Art. 697 to §1217, Art. 703f. See Penal Code.

**CH. 6.—OF BURGLARY.**

§1218, Art. 704. Burglar defined. See Penal Code.	§1223. Decisions relating to entry. <i>Annotated.</i>
§1218a. Decision on the preceding article. <i>Annotated.</i>	§1224, Art. 708 to §1236, Art. 716. See Penal Code.
§1219, Art. 705. See Penal Code.	§1237. Evidence. <i>Annotated.</i>
§1220. Indictment. <i>Annotated.</i>	§1238. See Penal Code.
§1221, Art. 706 and §1222, Art. 707. See Penal Code.	

**§1218a. Decision as to entry by force.**

Indictment for burglary charged that the house was entered by force at night. To warrant a conviction, it devolved upon the State to establish by affirmative proof the entry as alleged. See the statement of the case for the substance of evidence held insufficient to support a conviction for burglary, inasmuch as it fails to establish an entry by force. *Jones v. S.*, 25 App. 226.

Indictment charging a nocturnal burglary will authorize a conviction only upon proof that the burglary was committed in the night time. Instruction that the jury could convict upon proof that the accused committed the burglary either in the night time or day time, was material error. *Guynes v. S.*, 25 App. 584.

**§1220. Indictment.**

Indictment is sufficient to charge the burglary of a railway car, if it alleges that the said car was occupied and controlled by a certain named person, and

that the burglarious entry was made with the fraudulent intent to take, etc., otherwise alleging all the elements of theft. The ownership of the car need not be alleged. Evidence that other cars of the same general description were burglarized would not vitiate the indictment for uncertainty, but might require the State to elect the one upon which a conviction would be sought. See the opinion for the charging part of an indictment *held* sufficient to charge the burglary of a railway car. *Hamilton v. S.*, 26 App. 206.

**Indictment for burglary** by force, threats and fraud, although it fails to charge that the offense was committed by day or by night, will support a conviction if the proof shows that the entry was effected by actual force in the night time applied to the building. The occupancy of the owner's agent or clerk during the temporary absence of the owner is the occupation of the owner.

It is not essential that the State should prove the non-consent of the owner, etc. *Buchanan v. S.*, 24 App. 195.

The entry of a room or house, with the free consent of the proprietor or occupant, is not burglarious. *Turner v. S.*, 24 App. 12.

To constitute a nocturnal burglary, under the statutes of this state, the house must have been entered by force, threats or fraud. The indictment in this case charges that the defendant "did by force, in the night time, break and enter the house," etc. *Held* that, to authorize a conviction under this indictment, it devolved upon the State to prove beyond a reasonable doubt that the accused entered the house by applying actual "force" to the building. In failing to so charge the jury, and in refusing to give a special instruction in substantial compliance with the rule announced, the trial court erred.

There was not only a total absence of evidence on this trial tending to show an entry by breaking or by force, as alleged in the indictment, but the proof was positive that the entry was made through an open door. *Held* insufficient to support the conviction for burglary. *Melton v. S.*, 24 App. 287.

The indictment charged conjointly burglary with intent to commit theft without alleging the elements of *intended* theft and that theft was committed. There being evidence of actual theft, the indictment was *held* sufficient to support a conviction. *Williams v. S.*, 24 T. 69.

To support a conviction for burglary it devolves upon the State to prove beyond a reasonable doubt not only the burglarious entry of the house, but the specific criminal intent alleged in the indictment. See the statement of the case for evidence *held* insufficient to support a conviction for burglary with intent to rape, because, even if sufficient to show the entry into the house, it is wholly insufficient to establish that specific intent. *Coleman v. S.*, 26 App. 252.

A special charge of the court was requested by the accused to the effect that if the jury found that there were large openings in said building, so situated as to admit of an easy entrance without force, and that the same could have been naturally used for said purpose and had been used for said purpose, and that at the time said property was taken an entry was made through either of said openings or unfinished ends, then the defendant is not guilty. *Held*, that the trial court did not err in refusing the said special charge, because, as the openings referred to were unusual places of entry, an entrance through either of them would be a burglarious entrance. *Painter v. S.*, 26 App. 454.

#### §1237. Evidence.

Indictment alleged the ownership of the house to be in E. W. Bullard. The ownership of the house was proved as alleged, and it was further proved that the said E. W. Bullard permitted his son to store corn in the said house. *Held*, that such proof does not amount to a variance between the allegation and the proof. *Painter v. S.*, 26 App. 454.

**Possession of recently stolen property.**—To warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive; must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. See the statement of the case for evidence which, under this rule, is *held* insufficient to support a conviction for burglarious theft. *Field v. S.*, 24 App. 422.

T. 17, CHS. 7-9.] OFFENSES AGAINST PROPERTY. §§1250, 1252a.

## CH. 7.—OF OFFENSES ON BOARD OF VESSELS, STEAM-BOATS AND RAILROAD CARS.

§1239, Art. 717 to §1243, Art. 721. See Penal Code.

## CH. 8.—OF ROBBERY.

§1244, Art. 722 to §1249, Art. 723. See Penal Code. | §1250. Evidence. *Annotated*.  
§1251. See Penal Code.

### §1250. Evidence.

The indictment charged a robbery by means of assault, violence and putting in fear. The proof shows that the defendant, at night, with his hat pulled down and his collar turned up, met the injured party and summoned him to throw up his hands, stating that he was an officer of the law, and would arrest the injured party for being drunk and noisy; that the injured party (who testified that he was much alarmed) threw up his hands, and the defendant then took a roll of money from the pocket of the said injured party. *Held*, that the proof sustains an indictment for robbery by putting in fear, wherefore the trial court did not err in refusing a requested charge to the effect that the jury should acquit the defendant if they believed that he obtained the money by so personating an officer that the injured party, believing him to be an officer, permitted him to take the money. *McCormick v. S.*, 26 App. 678.

## CH. 9.—OF THEFT IN GENERAL.

§1252, Art. 724. See Penal Code.

§1252a. Theft defined. *Annotated*.

§1253. See Penal Code.

§1254. Fraudulently taken. *Annotated*.

§1255. Intent. *Annotated*.

§1256. See Penal Code.

§1257. Value. *Annotated*.

§1258. Ownership and possession. *Annotated*.

§1259. Want of owner's consent. *Annotated*.

§1260 to §1263. See Penal Code.

§1264. What offenses not included. *Annotated*.

§1265, Art. 725 and §1266, Art. 726. See Penal Code.

§1267. Decisions as to asportation. *Annotated*.

§1268, Art. 727. See Penal Code.

§1269. Taking must be wrongful. *Annotated*.

§1270, Art. 728 to §1286, Art. 738. See Penal Code.

§1287. Voluntary return of stolen property. *Annotated*.

§1288, Art. 739 to §1292, Art. 742a. See Penal Code.

§1292a. Construction of Art. 742a. *Annotated*.

§1293. Evidence in general. *Annotated*.

§1294. Taking and asportation. *Annotated*.

§1295. Fraudulent intent. *Annotated*.

§1296. Identity of property alleged to have been stolen. *Annotated*.

§1297. Ownership and possession. *Annotated*.

§1298. Want of owner's consent. *Annotated*.

§1299. Possession of stolen property. *Annotated*.

§1300. Defendant's explanation of possession. *Annotated*.

§1301 to §1305. See Penal Code.

§1306. Charge of the court. *Annotated*.

§1307 and §1308, Art. 743. See Penal Code.

§1309. Decisions in regard to receiving stolen property. *Annotated*.

### §1252a. Theft defined.

Receiving stolen property, knowing it to be stolen, is, under the law of this state, a separate and distinct offense from theft, and a party indicted for theft cannot, under that indictment, be convicted of receiving stolen property, knowing it to be stolen. *Gray v. S.*, 24 App. 611.

**Circumstantial evidence.**—The *factum probandum* of theft, as that offense is defined by our statute, is the *taking* of the property. If the *taking*, being the main fact in issue, is not directly attested by an eye witness, but is proved as a matter of *inference* from other facts in evidence, the case rests wholly upon circumstantial evidence, and the failure of the trial court to give in charge to the jury the law of circumstantial evidence is material error. See this case in illustration.

**Accomplice testimony.**—The *corpus delicti* of theft cannot be established by the uncorroborated testimony of an accomplice, but upon that issue the accomplice must be corroborated by other evidence tending to show the commission of the offense, and the defendant's connection with the commission of the same. It will not suffice to corroborate such testimony only to the extent of connecting the defendant with the commission of an act alleged to be an offense. In this case the ownership of an animal alleged in the indictment was proved only by the uncorroborated testimony of the accomplice. *Held*, insufficient on the issue of ownership, and, therefore, insufficient to support the conviction.

**Charge of the court.**—See the statement of the case for a charge of the court upon accomplice testimony *held* erroneous, because it applies the law too broadly to the facts of the case, and does not, as it should, require the corroboration of the accomplice to be as to facts tending to show the commission of an offense, and the defendant's connection with such commission.

The charge in this case is otherwise erroneous in that it instructs the jury that the *killing* of the animal constituted the offense, whereas the *taking* (if any) of the animal constituted the offense. Moreover, the facts demanded that the charge should submit to the jury whether the witness M. was an accomplice, and in omitting to do so, and in refusing the defendant's requested instruction upon the subject, the trial court erred. *Crowell v. S.*, 24 App. 404.

#### §1254. Fraudulently taken.

Theft comprehends other ingredients besides a fraudulent taking, each of which is equally essential to constitute the offense. A verdict, therefore, which merely finds the accused guilty of a "fraudulent taking" of the property, and a judgment which adjudges him guilty of a "fraudulent taking" of the property, will not support a conviction for theft. *Johnston v. S.*, 25 App. 731.

#### §1255. Intent.

Felonious intent is the essential ingredient of theft, and, to constitute that offense, the taking must, in the first instance, have been fraudulent. If the possession was obtained unlawfully, no subsequent appropriation will constitute theft, unless possession was obtained by means of false pretext, or with the fraudulent intent, at the very time of the taking, to deprive the owner of the value of the property and appropriate the same to the use of the taker. *Guest v. S.*, 24 App. 235.

An essential element of the crime of theft is that the property was taken by the accused with intent to appropriate the same to his own use and benefit. In the general charge in this case this element, in the application of the law to the facts, was omitted. *Held* that, in view of the proof on the trial, the omission was error.

The defense requested a special charge, as follows: "If Boyd bought the cow from Mixon, whether in good or bad faith, and defendant's connection with the cow was only to aid in disposing of said cow—in other words, if said cow was stolen by some one else than defendant, and sold to Boyd—then defendant's subsequent connection with the cow would not be theft, and, if you so find, you will acquit the defendant." *Held* that, in view of the evidence on the trial, the refusal of the special charge was error. *Willis v. S.*, 24 App. 584.

Indictment for theft must charge explicitly all that is essential to constitute the offense, and cannot be aided by intendment; and one of the essentials of theft is the intent to appropriate the property alleged to be stolen. "Appropriate" and "appropriate" are not *idem sonans*, and the former unmeaning term cannot be used in the stead of the latter statutory term, to charge the necessary intent to constitute theft. The motion to quash the indictment should, therefore, have been sustained in this case. *Jones v. S.*, 25 App. 621.

#### §1257. Value.

To support a conviction for theft, unless it be for theft from the person, or of a horse, mule, ass, or cattle, it devolves upon the State to prove the value of the

property stolen. The proof in this case is insufficient, because there was no evidence adduced to support the allegation of value of corn charged to have been stolen. *Ellison v. S.*, 25 App. 328.

**§1258. Ownership and possession.**

Indictment alleged the possession and ownership of the stolen animal to be in S. The proof established the ownership as alleged, but showed that the animal was taken from the possession of B. *Held*, that the proof confutes the allegation of possession.

Under the circumstances of this case, the indictment should either have alleged both the possession and ownership in B., or that S. was the owner of the animal and that it was taken from the possession of B., who was holding it for S. *Williams v. S.*, 26 App. 131.

If in a prosecution for theft under an indictment which alleges the ownership of the property stolen to be in some person to the grand jurors unknown, it transpires on trial that the ownership could have been ascertained by the exercise of reasonable diligence, it becomes the duty of the trial court, in the event of conviction, to award a new trial. *Lanham v. S.*, 26 App. 533.

Ownership, like every other material issue on a trial for theft, must be proved by competent evidence, and if it rests upon the testimony of an accomplice, such proof is insufficient, unless legally corroborated. *Hanson v. S.*, 27 App. 140.

Actual care, control and management of the alleged stolen property will support an allegation of possession.

The indictment alleged ownership and possession in D. The proof showed that though the animal belonged to D. one H. found it on his premises, and proclaimed his intention to stray it. But before H. could complete the estray, the animal was stolen from his premises. *Held*, that the possession was in H. and the variance between the allegation and proof was fatal. *Tinney v. S.*, 24 App. 112; *Alexander v. S.*, 24 App. 126.

An information or indictment for theft of the property of a corporation must not only describe the corporation by its correct corporate name, but should allege that it was a corporation. An allegation that the "Mo. P. R'way Company" was the owner of the stolen property will not suffice. *White v. S.*, 24 App. 231.

The indictment alleged the ownership of the property stolen to be in Columbus C. Littlefield, and the proof disclosed that, though his proper name was Christopher Columbus Littlefield, he was usually known as Columbus Littlefield, and was often addressed as Columbus C. Littlefield. *Held* that, if the proof showed that he was as well known by the name set out in the indictment as by any other, a conviction otherwise regular would be sustained. *Lott v. S.*, 24 App. 723.

It devolves upon the State, in a prosecution for theft, to prove the name of the owner of the alleged stolen property as it is alleged in the indictment. The given name may be alleged by initials; and, though a variance between the middle initial as alleged and as proved will be immaterial, a variance as to the first initial letter of the given name will be fatal, unless it be proved that the owner was known as well by the name alleged as by the name proved. The indictment alleged the name of the owner in this case to be N. J. S., and the proof showed the name to be M. J. S. The trial court charged, in substance, that if the jury believed M. J. S. to be the person named in the indictment as N. J. S., the proof of ownership would be sufficient. *Held*, erroneous. *Willis v. S.*, 24 App. 487.

**Brand as evidence of ownership.**—While a recorded brand is evidence of ownership, it is only *prima facie* evidence, to be considered by the jury like any other evidence. *Alexander v. S.*, 24 App. 126.

A brand, although recorded after the commission of the offense, is admissible in evidence, but is not sufficient to prove ownership.

A "road brand," as distinguished from a "range brand," is a brand required by statute to be placed upon cattle before being removed from the county in which they are gathered to market outside of the state, which brand must be recorded in the county from which the cattle are to be driven, and before their removal from such county. The brand introduced in evidence in this case was the "road brand" of the alleged owner, which was recorded *after* the cattle were driven from the county where gathered, and after the commission of the offense. *Held*, that the said brand was inadmissible to prove ownership, and should have been excluded. *Crowell v. S.*, 24 App. 404.

While a *recorded brand* is evidence of ownership, it and the brand found upon the animal must correspond and be identical, and it must appear on the part of the animal indicated in the record, or the discrepancy in this regard must be satisfactorily explained. *Myers v. S.*, 24 App. 334.

**§1259. Want of owner's consent.**

The indictment alleged the ownership of the animal to be in C. and A. and R., and that the same was taken without the consent of C. or A. or R., or either of them, which correctly alleged the want of consent. The trial court charged the jury to convict if they found that the defendant took the animal without the consent of C. or A. or R., or either of them. *Held*, fundamental error, inasmuch as it was equivalent to an instruction to convict if any one of the parties did not consent, notwithstanding either or both of the other two may have consented. *Woods v. S.*, 26 App. 490.

**§1264. What offenses not included.**

A conviction of embezzlement cannot be obtained on an indictment for theft. *Lott v. S.*, 24 App. 723.

**§1267. Decisions as to asportation.**

Inasmuch as asportation is not necessary in this state to constitute theft, and inasmuch as the marking and branding of an animal cannot be accomplished without an actual manual possession of the same by the person so doing, an illegal marking and branding of an animal for the purpose of appropriating the same will evidence a fraudulent taking. *Coward v. S.*, 24 App. 590.

**§1269. Taking must be wrongful.**

To constitute theft the taking of the property must have been wrongful, unless the possession of the property was obtained by some false pretext, or the taking was accompanied by the intent to deprive the owner of the value of the property. Conversion by the accused of property lawfully obtained is not sufficient to establish the fraudulent intent at the time of the taking. See the opinion *in extenso* for the substance of evidence *held* insufficient to support a conviction for horse theft. *Stokely v. S.*, 24 App. 509.

A conviction for the t by means of false pretext may be had under an indictment charging theft in usual form. The evidence in this case shows that the accused acquired the possession of the alleged stolen horses with the consent of the owner, under a contract of hiring. Under this proof the trial judge charged the jury upon theft by means of false pretext, as defined by article 727 of the Penal Code, and also theft, as defined by the act of March 8th, 1887, *i. e.*, fraudulent conversion of property without the consent of the owner.

When said property has been obtained from the owner by virtue of a contract of bailment. *Held*, that the proof authorized the charge first mentioned, but that the same was insufficient, inasmuch as it failed to instruct the jury explicitly that the fraudulent intent on the part of the accused must have existed at the very time he obtained possession of the property, and that no subsequent fraudulent intent would constitute theft. *Taylor v. S.*, 25 App. 96.

**§1287. Voluntary return of stolen property.**

When, as in this case, the evidence on a trial for theft tends to show a voluntary return of the stolen property by the accused to the owner, within a reasonable time, and before prosecution has been instituted, it devolves upon the trial court to charge the jury upon the law applicable to such defense. See the statement of the case in *Guest v. The State*, 24 App. 235, for evidence *held* to raise the issue of a voluntary return of the alleged stolen property, within the statutory meaning of that defense. *Guest v. S.*, 24 App. 530.

**§1292a. Construction of article 742a.**

The constituent elements of the species of theft defined by the said act of March 8th, 1887, are essentially different from those of theft in general, and from theft by means of false pretext, inasmuch as, to constitute the theft denounced by the said act of March 8th, 1887, the fraudulent intent refers to and must concur with the act of *conversion*, and need not exist at the time of obtaining the possession of the property. Proof, therefore, which would support a conviction for the theft defined by the said act of March 8th, 1887, would not authorize a conviction for theft under an indictment for general theft; and inasmuch as the indictment was in general form, the charge of the court upon the theft defined by



the said act of March 8th, 1887, was unwarranted and erroneous. See the opinion *in extenso* for an elucidation of the principle. *Taylor v. S.*, 25 App. 96.

**§1293. Evidence in general.**

On a trial for theft the State, over the objection of the accused, was permitted to prove that, for the four or five years prior to the trial, the accused had been confined in the penitentiary for felony. *Held*, that the proof was illegal and incompetent. Its admission was error in the first place, and the trial court further erred in overruling the motion of the accused to exclude it from the consideration of the jury. *Guajardo v. S.*, 24 App. 603.

**§1294. Taking and asportation.**

The proof shows that the accused borrowed a horse from the owner in the Indian Territory and rode it into Cooke county, Texas, where, without the consent of the owner, and with the fraudulent intent to convert and appropriate the said property to his own use, he sold it. *Held*, that such facts constitute the crime of theft as defined by the act of March 8th, 1887. [Willson's Crim. Stat., Art. 742a.] *Brooks v. S.*, 26 App. 184.

**§1295. Fraudulent intent.**

If the possession of the property was obtained by the defendant from the owner lawfully and in good faith, its subsequent appropriation by the defendant to his own use, without the owner's consent, does not constitute theft. *Lott v. S.*, 24 App. 723.

As tending to establish identity in developing the *res gesta*, or to prove guilt by circumstances connected with the theft, or to show the intent of the accused with respect to the property described in the indictment, it is competent for the State to prove the theft by defendant of other property at the same time and place of the theft in question, but it is not competent to prove a distinct theft committed by defendant at another time and place. See the statement of the case for evidence of distinct thefts *held* to have been erroneously admitted. *Williams v. S.*, 24 App. 412.

See the opinion *in extenso*, and the statement of the case for proof developed on a trial for horse theft, which, raising the defense of mistake of fact on the part of the accused in asserting claim to the animal alleged to have been stolen, demanded of the trial court the submission of that issue to the jury under proper instructions. Note also that, in view of the proof, the trial court having refused the accused a continuance, should have awarded him a new trial. *Creswell v. S.*, 24 App. 604.

The evidence in this case tending to support the defense that the accused killed the alleged stolen animal by direction of his employer, the charge of the court was erroneous in not instructing the jury that if they believed that the accused took the said animal by direction of his employer, for the use and benefit of his employer, believing at the time that his said employer owned or had a right to appropriate the animal, then the accused would not be guilty of theft, because of the absence of the fraudulent intent. *Myers v. S.*, 24 App. 334.

**§1296. Identity of property alleged to have been stolen.**

The indictment in this case charges the theft of a "beef, an animal of the cattle kind." The proof shows that the alleged stolen animal was a cow. *Held*, that the term "cow" is embraced in the term "beef," and that there is no variance between the allegation and the proof. *Smith v. S.*, 24 App. 290.

**§1297. Ownership and possession.**

The indictment charged the ownership and possession of the property to be in J. C. B. The proof showed that the horse was taken by the accused from a place at which one Bull had hopped it by direction of D. H. B., who had borrowed the animal from J. C. B. *Held*, that the proof established the possession in D. H. B., and that the variance between the allegation and proof on that issue is fatal to the conviction. *Conner v. S.*, 24 App. 245.

Proof that M. was a joint owner and possessor with others of the stolen property will support the allegation of the indictment which laid the ownership and possession in him only. See the statement of the case for a charge of the court on the issues of ownership and possession *held* correct and sufficient. *Clark v. S.*, 26 App. 486.

**§1298. Want of owner's consent.**

The consent of the owner was not shown by proof that, for the purpose of detecting the accused in the very act of theft, the horse was hopped with the expectation and intent that defendant would take him, it not appearing that the owner in any way suggested the theft to the accused or induced him to commit it. *Conner v. S.*, 24 App. 245.

**§1299. Possession of stolen property.**

Possession of recently stolen property is not positive evidence of theft. At most, it is but a circumstance tending to establish theft. A case, therefore, depending alone upon the possession of recently stolen property is a case resting alone upon circumstantial evidence, and in such case the omission of the trial court to charge the jury upon the law of circumstantial evidence is material error. Note the opinion for a state of proof to which the rule applies.

**Presumptions.**—The general rule obtains that if a party, in whose exclusive possession property recently stolen is found, fails reasonably to account for his possession when called upon to explain, or when the facts are such as to require of him an explanation, the presumption of guilt arising from recent loss and possession will warrant a conviction without further proof. In such case, however, it is for the jury, under proper instructions, to determine the question of recent possession; and they should be explicitly charged that, unless they found such possession was recent, they would indulge no presumption of defendant's guilt because of his being found in possession of the property. The failure of the trial court, under the proof in this case, to charge the jury upon this doctrine, and its refusal to give the special instruction upon the same, was material error.

In order to warrant a conviction for theft, it devolves upon the State to show by affirmative proof the defendant's participation in or connection with the original taking of the property. If the proof merely connects the defendant with the property subsequent to its actual taking, it will not authorize a conviction for theft, however manifest it may make his guilt of another offense. See the opinion for a statement of the rule on the doctrine.

**Charge of the court.**—Upon the proof in this case, which failed to show the defendant's connection with the original taking of the stolen property, but tended to establish his subsequent connection with the same, with the knowledge that it was stolen, the defense requested the trial court to charge the jury as follows: "Before the jury can convict the defendant, they must believe beyond a reasonable doubt that he is guilty of the original fraudulent taking, and any subsequent connection after the taking would not be theft, either in good or bad faith; and, if the jury believe the defendant purchased the cow from *Mixon*, or any other party, after the fraudulent taking, either in good or bad faith, he is not guilty of theft." *Held*, that under the rule announced, and under the proof stated, the refusal of the requested charge was error. *Boyd v. S.*, 24 App. 570.

**Possession of stolen property.**—The inculpatory fact relied upon in this case was the recent possession of the alleged stolen property by the defendant. The question raised by the proof was whether or not the facts established a case of recent possession. In failing to give in charge to the jury proper instructions as to the law applicable to such possession, the trial court erred.

The defendant, *Willis*, requested the court to specially charge the jury as follows: "Should you believe from the evidence that defendant, *W. E. Willis*, simply stayed, or went home, if *Boyd's* house was his home, and was requested to assist in branding said cattle, without a previous agreement or participation in the offense charged, you will acquit him." *Held* that, in view of the evidence tending to support this defense, the refusal of this special instruction was error. *Willis & Boyd v. S.*, 24 App. 586.

Possession, however recent, if explained and accounted for, and shown to be lawful, does not create a presumption of guilt. *Bean v. S.*, 24 App. 11.

Upon a trial for theft—possession of the stolen property being the inculpatory fact—the State was correctly permitted to prove the defendant's contemporaneous possession of other stolen animals than that described in the indictment; such proof being admissible upon the question of identity in developing the *res gesta*, or to prove by the circumstances the theft on trial, or the intent of the accused with respect to the animal named in the indictment. But, in failing to limit such proof to such purpose, the charge was materially defective. *Willis v. S.*, 24 App. 584.

The trial court, in a theft case, charged the jury as follows: "Upon the trial of one charged with the theft of a horse, the possession of the horse without a written bill of sale containing a specific description of the horse is *prima facie* evidence against the accused that the possession is illegal." *Held* erroneous, as upon the weight of evidence.

The trial court charged the jury as follows: "When one charged with theft is found in possession of the stolen property, if he gives a reasonable explanation of his possession of the property, it then devolves upon the State to show such statement to be false; otherwise the accused must be acquitted." See the opinion and the statement of the case for evidence which, in view of the law thus correctly expounded by the charge, is held insufficient to support the conviction. *Gilleland v. S.*, 24 App. 524.

To warrant the inference of guilt from possession alone, the possession must be a personal one, and must involve a distinct and conscious assertion of claim by the accused, and must be recent and unexplained. See the opinion for the substance of evidence held not to constitute such possession, and insufficient to support a conviction for theft. *Bryant v. S.*, 25 App. 751.

Possession of stolen property, in order to raise a presumption of guilt, must be recent. Remote possession of such property raises no such presumption and is but a circumstance, stronger or weaker in proportion to its remoteness from the original taking. The first connection of the accused in this case with the alleged stolen animal, so far as established by the proof, was eleven months subsequent to the theft of the same. *Held* that, in view of such proof, the omission of the court to instruct the jury as to the law applicable to the possession of stolen property was error. *Florez v. S.*, 26 App. 477.

Possession of stolen property, to raise against the accused the presumption of guilt, must be recent, and be unexplained under circumstances calling upon accused for an explanation. Remote possession, however, will not call for an explanation, and will not raise the presumption of guilt. See the opinion for an elaboration of the rule and the statement of the case for evidence under which it is *held* that, in the first place, the possession of the stolen property was too remote to demand an explanation from the accused or to raise against him the presumption of guilt, and, in the second place, that the explanation made by the accused was reasonable and was not sufficiently rebutted by the evidence for the State. *Matlock v. S.*, 25 App. 654.

Possession of stolen property, to raise a presumption of guilt, must be recent. See the opinion and the statement of the case for evidence held insufficient to support a conviction for horse theft, inasmuch as the defendant's possession, proved and relied upon by the State, was too remote to raise the presumption of guilt. *Romero v. S.*, 25 App. 394.

Charge of the court in a theft case, if the inculpatory facts consist alone of recent possession of stolen property, explained by the accused when his possession was first challenged, is insufficient, unless it explains to the jury the law applicable to such recent possession and explanation. *Fernandez v. S.*, 25 App. 538.

See the opinion and the statement of the case for evidence *held* insufficient to support a conviction for horse theft, because the State, relying alone upon recent possession of alleged stolen property, proved the explanation of his possession by the accused when it was first challenged, which was a reasonable one, but failed to prove that it was false. *Tarin v. S.*, 25 App. 360.

Possession of the alleged stolen property was the sole proof relied upon for a conviction. The evidence as to what was the explanation of the accused, when his right of possession was first called in question, was conflicting, and the accused proposed to prove his second explanation, which he was not permitted to do. *Held* that, in view of the facts that the State's witnesses contradicted each other on the question, and that the proposed second explanation of the accused was corroborative of his first explanation as testified to by his witnesses, the proposed evidence should have been received. *Andrews v. S.*, 25 App. 339.

In a trial for horse theft a State's witness testified that, soon after the theft, he went to a certain place and there found the stolen horse in the possession of the defendant and two other men. Over objection by the defense the witness was permitted to make the further statement that he went to the said place for the purpose of locating the defendant, in compliance with the request of the sheriff of the county. *Held*, that the explanation was proper and legitimate for the purpose of repelling any inference to the discredit of the witness. *Brookin v. S.*, 26 App. 121.

**§1300. Defendant's explanation of possession.**

With reference to the defendant's explanation of his possession of recently stolen property, the trial court charged the jury as follows: "If you believe from the evidence that the animal in question had been recently stolen, and the defendant was found in possession of the same, and, when his right to the possession of said animal was first challenged, he gave a reasonable account thereof, consistent with his innocence, it devolves upon the State to show that it was untrue. If, however, when his possession was first challenged, he failed to reasonably and satisfactorily account for his possession thereof, you will find him guilty as charged in the indictment." *Held*, that the latter clause of the said charge is erroneous, not only because it is upon the weight of evidence, but because it restricts the defensive proof to an opportune and reasonable explanation of the possession by the accused of the stolen property. *Arispe v. S.*, 26 App. 581.

The defense proposed to prove that the defendant, at his first meeting with the owner of the property after the alleged theft, proposed to pay him for the same. It was also proposed to prove the conversation which then ensued between the defendant and the owner, which conversation is not set out in the bill of exceptions. *Held*, that the said proof was properly excluded as being no part of the *res gestæ* nor relevant to any issue in the case, and as not coming within the rule which qualifies as evidence a defendant's explanation of his possession of stolen property. *Brooks v. S.*, 26 App. 184.

**§1306. Charge of the court.**

**Possession of recently stolen property.**—With respect to the presumption arising from the possession of recently stolen property, the trial court charged the jury as follows: "If a person is found in possession of property recently stolen, and if the circumstances are such as call upon him for an explanation, and he fails to give any explanation of such possession, then these facts would authorize his conviction, if a presumption of guilt has arisen in the minds of the jury from such facts." *Held* erroneous, as being a charge upon the weight of evidence. See the opinion *in extenso* for the correct rule upon the subject. *Stockman v. S.*, 24 App. 387.

Possession of stolen property, whether recent or remote, is a circumstance admissible in evidence, to be considered by the jury in connection with the other proof in the case. But to warrant the inference of guilt from the possession alone, the possession must be a personal one; must be recent and unexplained, and must involve a distinct and conscious assertion of claim by the possessor. Note the opinion for a state of proof to which this rule applies; wherefore, in refusing a special charge in harmony with the principle, the trial court erred.

But note that, in this case, even had the charge been given, the evidence would not support a conviction, because recent possession alone, without an opportunity to explain, will not authorize a verdict of guilty. Had the special charge been given, the evidence would still have demanded the award of a new trial.

See the opinion *in extenso* for a summary of the inculpatory proof in this case held insufficient to support a conviction for theft of cattle. *Moreno v. S.*, 24 App. 401.

Where there is evidence from which the jury might infer that the taking was not fraudulent, it is the right of the defendant to have them clearly instructed as to the distinction between trespass and theft. *Guest v. S.*, 24 App. 235.

Purchase of the animal was the defense interposed to the prosecution for the theft of the same, and, the defendant having produced evidence tending to establish that defense, he was entitled to an affirmative charge instructing the jury to the effect that if they believed from the evidence that the defendant purchased the animal, or if, from the evidence as to the purchase, they entertained a reasonable doubt that he stole the animal, they must acquit him of the charge of theft. The refusal of a special charge embodying the rule as stated was error. *Roy v. S.*, 24 App. 369.

Purchase of the animal was the defense relied upon by the defendant in this case, and it was an issue raised by the evidence. It was, therefore, the duty of the trial court, however improbable the evidence supporting the issue may have appeared, to submit the issue in charge to the jury, and the failure to do so was material error. *Smith v. S.*, 24 App. 290.

**Evidence.**—However improbable may be the evidence in support of a defense, it is the duty of the trial court to submit the issue to the jury under proper in-

structions. A defense witness in this case testified that he was present and witnessed the defendant's purchase of the alleged stolen animal. *Held*, that in failing to submit the question of a purchase *vel non* to the jury, the charge of the court was erroneous. *McDaniel v. S.*, 24 App. 552.

The indictment charged the appellant with the theft of "one head of neat cattle." The proof shows that the cow of the alleged owner, with her original ear marks changed into the ear marks of the appellant, was found in the pen of the appellant, the appellant and another being present. To the owner's claim of property the appellant asserted no counter-claim, nor did he offer any explanation of his possession, but helped to turn the cow out of the pen. Afterwards, a yearling, the off-spring of the cow, was found upon the range, both the brand and the ear marks of the owner of the cow, originally upon it, having been changed to the brand and ear marks of the appellant. *He d.* that the proof should have been made to designate which of the animals was referred to in the indictment, and the charge of the court should have limited the evidence respecting the other animal to the legitimate purpose for which it was received. For the same reason—that it does not identify the animal referred to in the indictment—the evidence is insufficient to support the judgment of conviction. *Coward v. S.*, 24 App. 590.

It is competent for the State, on a trial for theft, to prove the contemporaneous theft by the accused of other property than that alleged in the indictment, but it then becomes the duty of the trial court to instruct the jury as to the purpose of such evidence. Omission to so instruct is not, however, fundamental error, nor is it material error, in the absence of exception or requested instructions, unless the defendant's rights may have been prejudiced thereby. *Gentry v. S.*, 25 App. 614.

Special charges are properly refused when the general charge correctly embodies all the law of the case. Upon the question of intent the trial court, in this case, sufficiently charged the jury that the fraudulent intent must have existed in the mind of the defendant at the time he sold the horse; and it did not err in refusing to give a similar instruction asked by the defendant. *Brooks v. S.*, 26 App. 184.

#### §1309. Decisions in regard to receiving stolen property.

In order to constitute the offense of receiving stolen property, knowing it to be stolen, the fraudulent intent to secure profit from the act or to protect the thief, and the knowledge that the property was stolen must concur with the commission of the act. The receiving of the property with intent to restore it to the owner without reward, or with any other innocent intent, although with knowledge that it was stolen, will not constitute the offense. In authorizing the jury to convict without proof of the criminal intent, and in omitting to instruct correctly upon the question of intent, and finally in refusing a special charge to supply the omission, the trial court erred in this case. *Arcla v. S.*, 23 App. 193.

Evidence in a theft case tending to establish the offense of receiving stolen property, knowing it to be stolen, the trial court erred in omitting to charge the jury that if they believed the evidence to establish such a receiving of the stolen property, and not an actual complicity in the taking of the property, the accused could not be convicted of theft. *Fernandez v. S.*, 25 App. 538.

### CH. 10.—OF THEFT FROM THE PERSON.

§1310, Art. 744 and §1311, Art. 745. See | §1312. Decisions relating to theft from the person. *Annotated.*

#### §1312. Decisions relating to theft from the person.

In theft from the person, as in general theft, the property must be taken without the consent of the owner, or, if the possession was lawfully obtained, it must have been obtained by the taker by some false pretext, or with the present intent to deprive the owner of the value of the property and appropriate it to his (the taker's) own use, and there must be an actual appropriation. See the statement of the case for evidence *held* insufficient to support a conviction for theft from the

T. 17, CHS. 11, 12.] OFFENSES AGAINST PROPERTY. §§1319a, 1326a.

person, because insufficient to establish the fraudulent intent at the time of the taking.

If the accused, when he obtained possession of the property, did so without false pretext or fraudulent intent, and believed that he had the consent of the owner to the taking, he would not be guilty of theft, even though he subsequently converted the property to his own use. This rule, applying to the state of case made by the proof, should have been given in charge to the jury. *Graves v. S.*, 25 App. 333.

## CH. 11.—THEFT OF ANIMALS.

<p>§1313, Art. 746 to §1319, Art. 749. See Penal Code.</p> <p>§1319a. Decisions on article 749. <i>Annotated.</i></p>	<p>§1320, Art. 750 to §1322, Art. 751. See Penal Code.</p>
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### 1319a. Decisions under article 749.

Though under an indictment charging theft of cattle in the usual form, a conviction may be had either for the theft defined in article 749 of the Penal Code, or for the misdemeanor of driving cattle from their accustomed range as defined in article 767 of the Penal Code, the verdict, to be sufficient, must show with reasonable certainty of which offense, the felony or the misdemeanor, the accused was found guilty. *Guest v. S.*, 24 App. 530.

## CH. 12.—MISCELLANEOUS PROVISIONS RELATING TO THE RECOVERY OF STOLEN ANIMALS AND THE DETECTION AND PUNISHMENT OF THIEVES.

<p>§1323, Art. 752 to §1326, Art. 753. See Penal Code.</p> <p>§1326a, Art. 753a. Butcher shall give bond. <i>New.</i></p> <p>§1326b, Art. 753b. Failure to file bond. <i>New.</i></p> <p>§1326c, Art. 753c. Failure to keep a record. <i>New.</i></p> <p>§1326d, Art. 753d. Purchase of slaughtered cattle without hide or ears. <i>New.</i></p> <p>§1326e, Art. 753e. Failure to permit examination of record. <i>New.</i></p>	<p>§1326f, Art. 753f. Failure to produce hide and ears on demand. <i>New.</i></p> <p>§1326g, Art. 753g. Neglect of duty by inspector or magistrate. <i>New.</i></p> <p>§1326h, Art. 753h. Failure of inspector or magistrate to keep record. <i>New.</i></p> <p>§2326i, Art. 753i. Counties excepted from provisions of act. <i>New.</i></p> <p>§1327, Art. 754 to §1332, Art. 758. See Penal Code.</p>
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### §1326a—Art. 753a.—Butcher shall give bond.

Every person, before he shall set up and carry on the trade of a butcher or slaughterer of cattle in the State of Texas, shall file a bond, to be approved by the county judge of the county in which he desires to carry on the business, in a sum of not less than five hundred dollars nor more than five thousand dollars, payable to the State of Texas, conditioned that he shall keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, with a description of the animal, including marks, brands, age, weight, and from whom purchased, and the date thereof; that he will have the hide and ears of such animal

inspected by the inspector or some magistrate of the county within five days after it is slaughtered; and that he will not purchase any cattle that has been slaughtered by another unless the hide and ears of such slaughtered animal accompanying said animal offered for sale; and that he will not purchase any animal that has been slaughtered by another, when the ear marks or brands on the hide accompanying such animal when offered for sale, have been changed, mutilated, or destroyed. [Act April 6; July 6, 1889, §1; 21 Leg. p. 84.]

**§1326b—Art. 753b.—Failure to file bond.**

Every person who shall be found carrying on the business of butcher or slaughterer, in the State of Texas, without having filed the bond provided in section one of this act shall be deemed guilty of a misdemeanor and be fined in a sum of not less than fifty nor more than two hundred dollars for every day he shall carry on such business. [Act April 6; July 6, 1889, §2; 21 Leg. p. 84.]

**§1326c—Art. 753c.—Failure to keep a record.**

Every person who shall carry on the business of butcher or slaughterer of cattle and shall fail to keep a true and faithful record, in a book kept for the purpose, of all cattle purchased or slaughtered by him, together with a description of each animal, including mark, brand, age, weight, and from whom purchased and the date thereof, or shall fail to have the hide and ears of such animal or animals inspected by the inspector or some magistrate of the county within five days after such animal is slaughtered, shall be deemed guilty of a misdemeanor, and for each offense fined in a sum not less than twenty-five nor more than two hundred dollars. [Act April 6; July 6, 1889, §3; 21 Leg. p. 84.]

**§1326d—Art. 753d.—Purchase of slaughtered cattle without hide or ears.**

Every person who shall carry on the business of butcher or slaughterer of cattle and shall purchase any cattle that have been slaughtered by another without the hide and ears of such animal accompanying the same, or who shall purchase any animal that has been slaughtered by another when the ear mark or brands on the hide accompanying the same when offered for sale have been changed, mutilated, or destroyed, shall be deemed guilty of a felony, and may upon conviction be punished by a fine not less than twenty-five nor more than five hundred dollars, or by confinement in the penitentiary for a term of not less than one nor more than three years, or by both fine and imprisonment, at the discretion of the jury trying the same. [Act April 6; July 6, 1889, §4; 21 Leg. p. 84.]

**§1326e—Art. 753e.—Failure to permit examination of record.**

The record provided for in §3 of this act (§1326c) shall be open to inspection of all persons, and any butcher or slaughterer refusing.

to permit such inspection or examination shall be deemed guilty of a misdemeanor, and on conviction fined in a sum not less than twenty-five nor more than two hundred dollars for each offense. [Act April 6; July 6, 1889, §5; 21 Leg. p. 84.]

**§1326f—Art. 753f.—Failure to produce hide and ears on demand.**

Any person who shall slaughter any cattle and offer the same for sale, or shall sell the same, and shall fail or refuse to produce the hide and ears of such slaughtered animal within the time prescribed by this act upon the demand of any officer of the county in which said animal is offered for sale, shall be deemed guilty of a felony, and on conviction may be fined in any sum not less than twenty-five dollars nor more than five hundred, or by confinement in the penitentiary for a term of not less than one nor more than five years, or by both such fine and imprisonment, in the discretion of the jury trying the same. [Act April 6; July 6, 1889, §6; 21 Leg. p. 84.]

**§1326g—Art. 753g.—Neglect of duty by inspector or magistrate.**

Any butcher or slaughterer of cattle who shall violate any of the conditions of the bond referred to in section 1 of this act, in addition to the penalty prescribed in the preceding articles of this act, may be sued upon his bond at the instance of the county or district attorney of the county where such bond is given, and all sums recovered by suits upon said bond shall be paid into the county treasury and become a part of the available school fund of such county. [Act April 6; July 6, 1889, §7; 21 L. p. 84.]

**§1326h—Art. 753h.—Failure of inspector or magistrate to keep record.**

It shall be the duty of the inspector or magistrate who inspects such hides as are mentioned in this act to keep a record of the marks, brands, color, and a general description of such hide, and for whom inspected, with the date of such inspection, and return the same to the clerk of the county court within ten days after such inspection, and shall be entitled to receive the sum of twenty-five cents for each hide so inspected, to be paid by the party having the hide inspected; and any inspector or magistrate who shall fail to keep such record, or shall fail to make such report to the county clerk as provided in this act, shall be deemed guilty of a misdemeanor, and on conviction may be fined in any sum not less than five nor more than twenty dollars for each hide that he shall fail to inspect or report as provided in this act. [Act April 6; July 6, 1889, §8; 21 Leg. p. 84.]



§1326i—Art. 753i.—Counties excepted from provisions of act.

*Provided*, that the provisions of this act shall in nowise apply to either of the following counties: Bell, Gonzales, Coryell, Hamilton, Mills, Brown, Comanche, Lavaca, Llano, San Saba, McCulloch, Concho, Runnels, Coleman, Travis, Grayson, Cooke, Montague, Colorado, Bexar, Jasper, Newton, Orange, Jefferson, Polk, San Jacinto, Tyler, Chambers, Hardin, Liberty, Harrison, Smith, Upshur, Gregg, Wood, Rains, Bowie, Cass, Morris, Titus, Lee, Bastrop, Fayette, Hill, Johnson, Ellis, McLennan, Falls, Robertson, Milam, Brazos, Galveston, Brazoria, Matagorda, Guadalupe, Caldwell, Hays, Blanco, Comal, Tarrant, Wise, Parker, Jack, Dallas, Nacogdoches, San Augustine, Sabine, Shelby, Panola, Rusk, Hunt, Hopkins, Delta, Franklin, Camp, Angelina, Houston, Leon, Grimes, Madison, Kaufman, Rockwall, Fannin, Lamar, Red River, Van Zandt, Henderson, Cherokee, Bosque, Hood, Erath, Somervell, Collin, Denton, Trinity, Walker, Montgomery, Harris, Austin, Washington, Wharton, Fort Bend, Waller, Burleson, Limestone, and Freestone. [Act April 6; July 6, 1889, §9; 21 Leg. p. 84.]

### CH. 13.—ILLEGAL MARKING AND BRANDING AND OTHER OFFENSES RELATING TO STOCK.

§1333, Art. 759 to §1337, Art. 761. See §1333, Art. 762 to §1347, Art. 769. See Penal Code.

§1337a. Decisions as to record of brand. Annotated.

#### §1337a. Decisions as to record of brand.

The certificate of the county clerk to a copy of the record of the brand of W. P. Coats, reads as follows: "The State of Texas, County of Taylor: I, David J. Red, clerk of the county court of said county, do hereby certify that the foregoing is a true copy of the record of the mark and brand of W. P. Coats (horse brand.)" Signed, with seal, etc. *Held*, sufficient to show that the said brand was recorded in Taylor county.

The proof shows that Coats lived in Taylor county when his brand was recorded in that county, and that, at the time of the alleged theft of the horse, he lived in Callahan county, at which said time his horse stock ran in the counties of Taylor, Callahan and Coleman. *Held*, that the record of the brand in Taylor county was sufficient, and complied with the provisions of the statute (Civ. Stats., Art. 4556), which require that marks and brands shall be recorded in the county court of the county in which the stock may be.

By express provision of the statute (Civ. Stats., Art. 4561), marks and brands, which would otherwise be intrinsically evidence of ownership, are admissible in the courts of this state, to prove ownership, only when they have been duly recorded. This rule applies to equine as well as to other stock named in the statute. *Thompson v. S.*, 26 App. 466.

Certificate of the county clerk of Young county to a copy taken from the record of marks and brands reads as follows: "The State of Texas, County of Young: I, Chas. O. Joline, clerk of the county court in and for said county, do hereby certify that the foregoing is a true copy of the record of the mark and brand of Wilkins Bros."—Signed, with seal, etc. *Held*, that such certification of the copy from the record was sufficient to show that the said mark and brand were recorded in Young county. *Byrd v. S.*, 26 App. 374.

CH. 14.—OFFENSES RELATING TO ESTRAYS.

§1348, Art. 770 to §1351, Art. 771. See Penal Code.

CH. 15.—OFFENSES RELATING TO THE PROTECTION OF STOCK RAISERS IN CERTAIN LOCALITIES.

§1352, Art. 772. See Penal Code.

§1352a, Art. 772a. Failure of inspector to inspect hides and animals. *New.*

§1352b, Art. 772b. Failure of inspector to keep a record. *New.*

§1352c, Art. 772c. Failure to state in certificate all marks and brands. *New.*

§1352d, Art. 772d. Failure to return certified copies of entries. *New.*

§1353, Art. 773 to §1368, Art. 785. See Penal Code.

§1352a—ART. 772a.—Failure of inspector to inspect hides and animals.

If any inspector or deputy inspector of hides and animals shall knowingly fail or refuse to faithfully examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment, and all animals driven or sold in his district for slaughter, packeries or butcheries, shall be fined not less than twenty-five dollars nor more than two hundred dollars. [Act April 4; July 6, 1889; 21 Leg. p. 36.]

§1352b—ART. 772b.—Failure of inspector to keep a record.

Any inspector of hides and animals who shall fail to provide and keep a well bound book and record therein a correct statement, showing the number, ages, and marks and brands of each animal inspected by him or by his deputy or deputies, and the number and all the marks and brands of all hides inspected by him or by his deputy or deputies, and whether the hides are dry or green, and the name or names of the vendor or vendors and of the purchaser or purchasers of said animals or hides, shall be fined not less than fifty dollars nor more than three hundred dollars. [Act April 4; July 6, 1889; 21 Leg. p. 36.]

§1352c—ART. 772c.—Failure to state in certificate all marks and brands.

Any inspector or deputy inspector of hides and animals who shall fail to correctly state in his certificate of inspection or in his certificate of acknowledgment all the marks and brands of all animals and hides inspected by him, shall be fined not less than twenty-five dollars nor more than three hundred dollars. [Act April 4; July 6, 1889; 21 Leg. p. 36.]

**§1352d—Art. 772d.—Failure to return certified copies of entries.**

Any inspector of hides and animals who shall fail to return a certified copy of all entries made in his record during each month to the clerk of the county court of his county on the last day of each month, shall be fined not less than fifty nor more than three hundred dollars. [Act April 4; July 6, 1889; 21 Leg. p. 36.]

**CH. 16.—EMBEZZLEMENT.**

§1369. Art. 786. See Penal Code.

§1370. Indictment. *Annotated.*

§1371. Evidence. Charge. *Annotated.*

§1372. See Penal Code.

§1373. Charge of the court. *Annotated.*

§1374. Art. 787 to §1390, Art. 789a. See Penal Code.

**§1370. Indictment for embezzlement.**

In an indictment against the treasurer of an incorporated company for embezzlement of its money, the only description of the money was as follows: "Five hundred dollars, lawful money of the United States of America, of the value of five hundred dollars, a more particular description of which the grand jury cannot give." The defense excepted to the indictment because it did not allege the names of the persons from whom the defendant received the said five hundred dollars, nor state whether the money was gold or silver coin, national bank or United States treasury notes, or United States paper money authorized by law. *Held*, that the exceptions were properly overruled, the facts showing that the allegation of the indictment is as definite and specific as practicable.

It is urged in this court that the indictment is insufficient, because it does not allege that the money was "current" money. *Held*, in view of the facts of this case, that such an allegation was not necessary in this indictment. *Malcolson v. S.*, 25 App. 267.

**§1371. Evidence. Charge.**

In a trial for embezzlement of money by an officer of an incorporated company, it was not error to allow the State to prove that the accused, without authority, but with the company's money, bought and charged to the company a pair of horses and a set of harness, and afterward sold the same. Appellant, however, insists that such proof necessitated an instruction to the jury not to convict for a conversion or sale of the horses and harness. But *held* that, the proof being competent for the purpose of tracing the company's money into the custody of the accused, and there being no purpose or attempt to convict him of a conversion or sale of the horses and harness, it was not incumbent on the trial court to instruct the jury as contended by appellant. *Malcolson v. S.*, 25 App. 267.

**§1373. Charge of the court.**

The proof in this case clearly establishing the agency of the accused with respect to the alleged embezzled property, the charge of the trial court upon the subject was correct.

The charge of the court referred to reads as follows: "In deciding as to whether or not the defendant was the agent of M., within the meaning of the foregoing charge, you are instructed that if you believe from the evidence that said M. told defendant to get said articles and bring them to him, and also told one Mrs. W. to have R. to get them and bring or send them to him or his wife, and that said R., in compliance with said instructions, did get into her possession said articles and deliver them to the defendant for him to send by express to said M., or to his wife for him, at Dallas, and that defendant so received into his possession said articles, agreeing with said R. to send them to said M., or to his wife for him, you will find the defendant to have been such agent." *Cooksie v. S.*, 26 App. 72.

**Standard of value.**—Second-hand clothing has no such market value as will represent an actual value in determining the grade of the offense of theft of such property. Nor can the rule obtaining among dealers in second-hand clothing “to sell for fifty per cent. less than original cost” furnish anything like a just standard of value.

The mode of arriving at the value of articles of that character which were embezzled was correctly stated in the following charge: “If you believe from the evidence that the defendant is liable under the charge given you, for the embezzlement of any of the articles described in the indictment, you are instructed that in arriving at the value of such articles, and thereby fixing the punishment of the defendant, you will be governed by what, if anything, you believe from the evidence was the fair and reasonable value of such articles at the time and place they were so embezzled.” *Cooksie v. S.*, 26 App. 72.

## CH. 17.—OF SWINDLING, AND THE FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.

§1381, Art. 790 and §1382, Art. 791. See Penal Code.	§1384, to §1395, Art. 797. See Penal Code.
§1383. Indictment for swindling. <i>Annotated.</i>	§1396. Decisions as to fraudulent disposition of mortgaged property. <i>Annotated.</i>

### §1383. Indictment for swindling.

Indictment for swindling by means of a false chattel mortgage and fraudulent verbal representations is not sufficient to charge the offense unless it sets out the alleged mortgage in *hæc verba*, or unless, stating good reason why the alleged mortgage could not be so set out, it sets it out in substance. *Ferguson v. S.*, 25 App. 451.

Indictment for swindling by false pretense must positively and clearly aver the commission of the acts of the accused. If a written instrument enters into the offense as matter of inducement it should be set out as in forgery. *Dwyer v. S.*, 24 App. 132.

Indictment charged the offense of swindling by means of a promissory note, which, though he knew it to be neither valid nor genuine, the accused represented to be good, valid and genuine. The indictment sets out the note in *hæc verba*, and upon its face it appears to be a valid obligation. The indictment, however, fails to allege the facts which render the note invalid and worthless. Exception to the indictment and a motion in arrest of judgment based upon this omission were overruled. *Held*, that the exception and the motion in arrest were well taken and should have prevailed. *Wills v. S.*, 24 App. 400.

### §1396. Decisions as to fraudulent disposition of mortgaged property.

Indictment, to be sufficient to charge the offense of disposing of mortgaged property with intent to defraud, must allege the name of the person to whom the mortgaged property was disposed of, or that the name of such person was unknown to the grand jury. *Smith v. S.*, 26 App. 577; *Alexander v. S.*, 27 App. 84.

The indictment in this case alleges that the mortgaged property was fraudulently disposed of by the accused to some person to the grand jury unknown. The evidence shows that it was disposed of to one Ike Thomas, and that the grand jury either knew, or by the exertion of reasonable diligence could have ascertained, that fact. *Held*, that the indictment is sufficient to charge the offense of fraudulently disposing of mortgaged property, but the evidence disproving an essential allegation in the said indictment, is insufficient to support the conviction. *Prealey v. S.*, 24 App. 494.

The indictment in this case described the property to which it related as “a growing crop,” and alleged that the mortgage thereon was executed on the fifteenth day of January, 1887, and pledged a crop not then planted. *Held*, that the indictment was insufficient to charge the offense denounced by article 797 of the Penal Code, as amended by the act of March 31st, 1885. To be sufficient to charge an offense, under the facts stated, the indictment should have charged that the accused executed a mortgage upon a crop to be planted; that

the said crop was afterwards planted by the accused, and that, when the same was planted by him, and was growing or grown, the mortgage attached to and became a lien upon the same, and that the accused fraudulently disposed of the same, etc. *Mooney v. S.*, 25 App. 31.

## CH. 18.—OF OFFENSES COMMITTED IN ANOTHER COUNTRY OR STATE.

§1397, Art. 798 and §1398, Art. 799. See | §1399. Decisions under preceding article. *Annotated.*  
Penal Code.

§1399. Decisions as to bringing stolen property into this state.

To support a conviction for the theft of property stolen in a foreign country and brought into this state, it devolves upon the prosecution to prove that the act committed was not only theft in this state, but was theft in the foreign country from which the property was taken and brought into this state. As sufficient proof of such fact, the trial court properly admitted in evidence a reprint of a book purporting to be the "Penal Code of the State of Coahuila, Republic of Mexico, and published by authority of said state;" the rule being that "when the code or the statutes of another state have been published by authority, and purport to have been so published, a reprint of such book is admissible in evidence, without other evidence of its sanction by the government of such state. *Fernandes v. S.*, 25 App. 538.

## TITLE 18.—OF MISCELLANEOUS OFFENSES.

### CH. 1.—OF CONSPIRACY.

§1400, Art. 800 to §1408, Art. 808. See | §1409. Decisions as to conspiracy. *Annotated.*  
Penal Code.

§1409. Decisions as to conspiracy.

**Conspiracy.**—The general rule obtains in this state that each conspirator is responsible for everything done by his confederates which follows immediately in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and must not be a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design. Whether or not the act was the ordinary and probable effect of the common design or conspiracy, or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, are questions which, under proper instructions, should be submitted to the jury for solution. See the opinion for a state of case to which the rule applies. *Bowers v. S.*, 24 App. 512.

**"Carving offenses."**—Conspiracy to commit burglary is a distinct offense created by the statutes of this state, and it is complete when two or more persons have positively agreed between themselves to commit burglary, though the burglary be never committed. If a burglary and a conspiracy to commit burglary involve the same transaction, the two offenses of burglary and conspiracy to commit burglary may be carved out of the same transaction, and a conviction for the one will not bar a prosecution for the other. See the opinion *in extenso* for an exhaustive discussion of the doctrine. *Whitford v. S.*, 24 App. 489.

Conspiracy to commit crime cannot be proved by one of the conspirators, but must be proved *aliunde*. See the opinion for evidence held insufficient to establish a conspiracy to steal cattle.

The declarations of a conspirator are not admissible in evidence against his confederate, unless they were made pending the conspiracy, and before the same was consummated, and were in furtherance of the common design. See the opinion for the declarations of a confederate *held* to have been improperly admitted in evidence. And note that, upon this question, the case of *Menges v. The State*, 21 Texas Court of Appeals, 413, is overruled. *Menges v. S.*, 26 App. 710.

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## CH. 2.—OF THREATS.

§1410, Art. 809 to §1415, Art. 813. See | §1416. Decisions as to sending threatening letter. *Annotated*.  
Penal Code.

§1416. Decisions as to sending threatening letter.

The offense defined by article 813 of the Penal Code is knowingly sending or delivering to another any letter or writing threatening to accuse him of a criminal offense, with the view of extorting money. The information in this case charged that the defendant did knowingly send and deliver to one W. a written letter threatening to accuse him of a criminal offense, and that he did *send* such letter with the view to extort money from him. *Held*, insufficient to charge that he *delivered* the said letter with the view to extort money.

The venue of the offense of sending a threatening letter for the purpose of extorting money, as that offense is defined by article 813 of the Penal Code, is in the county from whence the said letter was sent, and not in the county to which it was sent. *Hurt, J.*, dissents, and holds that the offense may be prosecuted in either county. *Landa v. S.*, 26 App. 590.

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## CH. 3.—SEDUCTION.

§1417, Art. 814 to 1421, Art. 817. See Penal Code.

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## TITLE 19.—REPETITION OF OFFENSES.

§1422, Art. 818 to §1426, Art. 821. See Penal Code.



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PART II.

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Code of Criminal Procedure.

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PART II.

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Code of Criminal Procedure.

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## TITLE 1.—INTRODUCTORY.

## CH. 1.—CONTAINING GENERAL PROVISIONS.

§1427, Art. 1 to §1451, Art. 9. See C.  
C. P.

§1452. Jeopardy; decisions as to. *An-*  
*notated.*

§1453. Plea of jeopardy. *Annotated.*

§1454, Art. 10 to §1479, Art. 27. See C.  
C. P.

§1452. Jeopardy; decisions as to.

It is a well settled rule that, "if a defendant moves in arrest of judgment, or applies to a court to vacate a judgment already rendered, for any cause, and his motion prevails, he will be presumed to waive any objection to being put a second time in jeopardy, and so may ordinarily be tried anew." See the opinion for a case to which the rule applies. *Sterling v. S.*, 25 App. 716.

§1453. Plea of jeopardy.

To the defendant's plea of former jeopardy the State interposed a demurrer, but the record fails to show in any manner that either the plea or the demurrer was acted upon by the court. *Held* that, under our practice, the plea of former jeopardy must be treated as waived. *Johnson v. S.*, 26 App. 631.

Former conviction was the defense specially pleaded to this prosecution. Exception to the sufficiency of the special plea was interposed by the State. The trial court ignored the exception and admitted evidence *pro and con* upon the issue raised by the special plea. *Held*, that in this state of case the special plea presented an issue for the determination of the jury, and the trial court erred in not submitting that issue to the jury under proper instruction. *Munch v. S.*, 25 App. 80.

## CH. 2.—THE GENERAL DUTIES OF OFFICERS CHARGED WITH THE ENFORCEMENT OF THE CRIMINAL LAWS.

§1480, Art. 28 to §1513, Art. 58. See C. C. P.

## CH. 3.—CONTAINING DEFINITIONS.

§1514, Art. 59. See C. C. P.

§1514a. Words defined. *Annotated.*

§1515, Art. 60 to §1518, Art. 63. See C.  
C. P.

§1514a. Words defined.

"Knowingly" and "pass," as those words are used in the statute denouncing the offense of uttering a forged instrument, are not words of technical signification, and the omission of the trial court to define the same to the jury was not error. *Peterson v. S.*, 25 App. 70.

## TITLE 2.—OF THE JURISDICTION OF COURTS IN CRIMINAL ACTIONS.

### CH. 1.—WHAT COURTS HAVE CRIMINAL JURISDICTION.

§1519, Art. 64. See C. C. P.

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### CH. 2.—OF THE COURT OF APPEALS.

§1520, Art. 65 to §1529, Art. 67. See C. C. P.

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### CH. 3.—OF THE DISTRICT COURTS.

§1530, Art. 68 to §1539a, Art. 71. See C. C. P.

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### CH. 4.—OF COUNTY COURTS.

§1540, Art. 72. See C. C. P.

§1541. Concurrent jurisdiction. *Annotated.*

§1542, Art. 73 to §1548, Art. 76a. See C. C. P.

§1542a. Where jurisdiction is increased or diminished. *Annotated.*

#### §1541. Concurrent jurisdiction.

The jurisdiction of the county court is concurrent with that of the justices' courts over misdemeanors cognizable in the justices' courts, and the offense defined by article 365, of the Penal Code, comes within this category. *Ballen v. S.*, 26 App. 483.

#### §1542a. Where jurisdiction is increased or diminished.

Section 22, of article 5, of the state Constitution, empowers the Legislature by local or general law to increase, diminish or change the civil and criminal jurisdiction of the county courts, and requires the Legislature, in the case of such change, to conform the jurisdiction of the other courts to the same.

Section 16, of the same article of the Constitution, provides that "in all appeals from justices' courts there shall be a trial *de novo* in the county court, and when the judgment rendered or fine imposed by the county court does not exceed one hundred dollars, such trial shall be final," etc.

By section 6, of the same article of the Constitution, it is provided that the court of appeals shall have appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade. This provision is re-enacted by article 66, of the Code of Criminal Procedure, which, however, is controlled by article 67, of the said Code, which expressly declares that article 66 shall not be so construed as to embrace cases which have been appealed from justices', mayors' or other inferior courts to the county court, and in which the judgment or fine in the county court shall not exceed one hundred dollars, exclusive of costs.

Article 76a, of the Code of Criminal Procedure, provides that, "in all counties in which the civil and criminal jurisdiction, or either, of county courts has been transferred to the district courts, appeals and writs of *certiorari* may be prosecuted

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to remove a case tried before a justice of the peace to the district court, in the same manner and under the same circumstances under which appeals and writs of *certiorari* are allowed by general law to remove cases to the county court."

Under the above constitutional and statutory provisions the Legislature, by act of March 27th, 1879, divested the county court of San Augustine county of all jurisdiction in misdemeanor cases, and conferred the same upon the district court of said county. This case originated in the justice's court, where a fine of five dollars was imposed upon the accused. He appealed to the district court, wherein, upon a trial *de novo*, a fine of five dollars was again assessed against him, and this proceeding is an attempted appeal to this court from the latter judgment. *Held*, that no appeal to this court lies from said judgment of the district court, and the cause is dismissed for want of jurisdiction by this court. See the opinion *in extenso*. *Johnson v. S.*, 26 App. 395.

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**CH. 5.—OF JUSTICES' AND OTHER INFERIOR COURTS.**

§1549, Art. 76 to §1553, Art. 79. See C. C. P.

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**TITLE 3.—OF THE PREVENTION AND SUPPRESSION  
OF OFFENSES, AND THE WRIT OF HABEAS  
CORPUS.**

**CH. 1.—OF PREVENTING OFFENSES BY THE ACT OF A  
PRIVATE PERSON.**

§1554, Art. 80 to §1561, Art. 86. See C. C. P.

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**CH. 2.—OF PREVENTING OFFENSES BY THE ACT OF  
MAGISTRATES AND OTHER OFFICERS.**

§1562, Art. 87 to §1568, Art. 93. See C. C. P.

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**CH. 3.—PROCEEDINGS BEFORE MAGISTRATES FOR  
THE PURPOSE OF PREVENTING OFFENSES.**

§1569, Art. 94 to §1583, Art. 108. See C. C. P.

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**CH. 4.—OF THE SUPPRESSION OF RIOTS, UNLAWFUL  
ASSEMBLIES AND OTHER DISTURBANCES.**

§1584, Art. 109 to §1592, Art. 117. See C. C. P.

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§1599a.

CH. 5.—OF THE SUPPRESSION OF OFFENSES INJURIOUS TO PUBLIC HEALTH.

§1598, Art. 118 to §1598, Art. 123. See C. O. P.

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CH. 6.—OF THE SUPPRESSION OF OBSTRUCTIONS OF PUBLIC HIGHWAYS.

§1599, Art. 124. See C. O. P.

§1599a. Preceding article inoperative.  
*Annotated.*

§1600, Art. 125 to §1603, Art. 128. See  
C. O. P.

§1599a. Art. 124 inoperative.

The second count in the information charges that defendant "did unlawfully and willfully prevent the free use of said public road, said prevention not being expressly authorized by law." *Held*, that the said count charges no offense against the laws of this state. Article 124 of the Code of Criminal Procedure is inoperative, because no penalty has been provided for its violation. *Rankin v. S.*, 25 App. 694.

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CH. 7.—OF THE SUPPRESSION OF OFFENSES AFFECTING REPUTATION.

§1604, Art. 129. See C. O. P.

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CH. 8.—OF THE SUPPRESSION OF OFFENSES AGAINST PERSONAL LIBERTY.

§1605, Art. 130 to §1682, Art. 195. See C. O. P.

T. 4, CHS. 1, 2.] TIME OF COMMENCING ACTIONS. §§1685a-1719.

## TITLE 4.—THE TIME AND PLACE OF COMMENCING AND PROSECUTING CRIMINAL ACTIONS.

### CH. 1.—THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED.

§1683, Art. 196 to §1685, Art. 198. See | §1686, Art. 199 to §1693, Art. 204. See  
C. C. P. | C. C. P.  
§1685a. For theft of hogs. *Annotated.*

§1685a. For theft of hogs.

In order to support a conviction for theft of hogs, the evidence must show that the offense was committed within five years next preceding the filing of the indictment. The statement of a witness that the offense was committed in "84" will be understood to mean that it was committed in the year 1884. *Wolfe v. S.*, 25 App. 698.

### CH. 2.—OF THE COUNTY WITHIN WHICH OFFENSES MAY BE PROSECUTED.

§1694, Art. 205 to §1705, Art. 216. See | §1705b, Art. 216b. Receiving and con-  
C. C. P. | cealing stolen property; of-  
§1705a, Art. 216a. Accessories and ac- | fender prosecuted, where.  
cessories, prosecuted, where. | *Amendment.*  
*Amendment.* | §1706, Art. 216 to §1718, Art. 225. See  
| C. C. P.  
| §1719. Proof of venue. *Annotated.*  
| §1720 and §1721. See C. C. P.

§1705a—Art. 216a.—**Accomplices and accessories prosecuted, where.**

Accomplices and accessories to the crime of theft may be prosecuted in any county where the theft was committed, or in any other county through or into which the property may be carried by either the principal, accomplice, or accessory to the offense. [Amendment April 4; July 6, 1889; 21 Leg. p. 37.]

§1705b—Art. 216b.—**Receiving and concealing stolen property; offender prosecuted, where.**

The offense of receiving and concealing stolen property may be prosecuted in the county where the theft was committed, or in any other county through or into which the property may have been carried by the person stealing the same, or in any county where the same may have been received or concealed by the offender. [Amendment April 4; July 6, 1889; 21 Leg. p. 37.]

§1719. Proof of venue.

Venue is an issue in a criminal case which may be as effectually proved by circumstantial as by direct evidence. It is not essential that it should be established beyond a reasonable doubt, but, if the evidence be reasonably sufficient to satisfy the jury that the offense was committed in the county of the prosecution, its finding to that effect will not be disturbed by this court. *McGill v. S.*, 25 App. 499.



T. 5, CHS. 1-4.] OF ARREST, COMMITMENT, AND BAIL. §§1735, 1800

## TITLE 5.—OF ARREST, COMMITMENT, AND BAIL.

### CH. 1.—OF ARREST WITHOUT WARRANT.

§1722, Art. 226 to §1728, Art. 231. See C. C. P.

### CH. 2.—OF ARREST UNDER WARRANT.

§1729, Art. 232 to §1734, Art. 239. See C. C. P.	§1736, Art. 237 to §1750, Art. 258. See C. C. P.
§1735. Decision as to complaints. An- notated.	

§1735. Decision as to complaints.

Complaint, unless authenticated by the *jurat* of the officer before whom it was made, will not support an information. Such a *jurat* is the certificate of the officer, signed *officially* by him, and stating that the affiant subscribed and swore to the complaint before him. An eligible pen-and-ink scrawl will not suffice to designate an official signature. *Robertson v. S.*, 25 App. 529.

### CH. 3.—OF THE COMMITMENT OR DISCHARGE OF THE ACCUSED.

§§1760, Art. 259 to §1784, Art. 281. See C. C. P.

### CH. 4.—OF BAIL.

§1785, Art. 282 to §1799, Art. 288. See C. C. P.	§1801, Art. 289 to §1845, Art. 321. See C. C. P.
§1800. Decisions as to requisites of bail-bond. Annotated.	

§1800. Decisions as to requisites of bail-bond.

A bail-bond which recites the offense as "unlawfully selling mortgaged property," describes no offense against the law of this state, and cannot be made the basis of a final judgment in a *scire facias* proceeding. See *P. C.*, ante, §1395, Art. 797. *Cravey v. S.*, 26 App. 84.

Bail-bond is void if it obligates the principal to appear before the court of jurisdiction at a time when no legal term of the same can be held. But see the opinion on rehearing to the effect that, under the law in force when the bond in this case was executed (November 15th, 1886), the time for the convening of the district court of Kerr county was the eighth Monday after the first Monday in March, and the bond, binding the principal to appear at the next term of the said district court on the eighth Monday after the first Monday in March, 1887, was, in this respect, valid.

Subsequent to the execution of the bond, and prior to the eighth Monday after the first Monday in March, 1887, the time for the convening of the district court of Kerr county, was, by act of the Legislature, changed from the eighth to the ninth Monday after the first Monday in March, and it was at the first term of the said court after such change that the judgment  *nisi* was rendered. *Held*, that the judgment  *nisi* was correctly rendered at such term, and the obligors in the bond were charged with notice of such change.

A bail-bond executed *after* the presentment of an indictment must describe the very offense named in the indictment. In this case the indictment, in separate counts, charges forgery and the uttering of a forged instrument in writing; and the bond, following the indictment, sets out the essential element of both offenses. *Held*, correct, and not obnoxious to the objection that it is duplicious. Judgment *nisi* is void unless rendered against the principal in the bond and *all* of the sureties. The judgment *nisi* in this case omits one of the sureties, and is, therefore, void; wherefore the final judgment is reversed. *Douglass v. S.*, 26 App. 248.

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## TITLE 6.—OF SEARCH WARRANTS.

### CH. 1.—GENERAL RULES.

§1846, Art. 322 to §1851, Art. 327. See C. C. P.

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### CH. 2.—WHEN AND HOW A SEARCH WARRANT MAY BE ISSUED.

§1852, Art. 328 to §1858, Art. 334. See C. C. P.

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### CH. 3.—OF THE EXECUTION OF A SEARCH WARRANT.

§1859, Art. 335 to §1867, Art. 343. See C. C. P.

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### CH. 4.—PROCEEDINGS ON THE RETURN OF A SEARCH WARRANT.

§1868, Art. 344 to §1875, Art. 351. See C. C. P.

## TITLE 7.—OF THE PROCEEDINGS SUBSEQUENT TO COMMITMENT OR BAIL, AND PRIOR TO THE TRIAL.

### CH. 1.—THE ORGANIZATION OF THE GRAND JURY.

§1876, Art. 352 to §1882, Art. 358. See C. C. P.	§1903, Art. 378 to §1908, Art. 383. See C. C. P.
§1882a. Exemptions from jury service. <i>Annotated.</i>	§1908a. Grand jury not dissolved by ab- sence of a member. <i>Annotated.</i>
§1883, Art. 359 to §1901, Art. 377. See C. C. P.	§1909, Art. 384 to §1917, Art. 391. See C. C. P.
§1902. Decisions as to challenges. <i>An- notated.</i>	

#### §1882a. Exemptions from jury service.

The exemption from jury service of justices of the peace and deputy sheriffs, they being civil officers, is a personal privilege to be claimed or waived by them only. Such officials are not disqualified by the articles of the Code defining the qualifications of grand jurors, nor by that enumerating the grounds upon which the array of the grand jury may be challenged. *Owens v. S.*, 25 App. 552.

#### §1902. Decisions as to challenges.

Article 377 of the Code of Criminal Procedure provides that "any person, before the grand jury have been impaneled, may challenge the array of jurors or any person presented as a grand juror, and in no other way shall objection to the qualifications and legality of the grand jury be heard." *Woods v. S.*, 26 App. 490.

#### §1908a. Grand jury not dissolved by absence of a member.

The motion to quash the indictment in this case was based upon the ground that it was presented by an illegal grand jury. The objection urged to the grand jury was that, although a legal body as impaneled, it was dissolved by the discharge of one of its members who had removed beyond the jurisdiction of the court and acquired a domicile in another state, before this indictment was presented; and that the eleven persons remaining on the panel did not constitute such a grand jury as was competent to present a legal indictment. *Held*, that the motion to quash was properly overruled. The legality of the grand jury could not be affected by the absence of one of its members. See the opinion *in extenso* for an elaborate discussion of the question. *Drake v. S.*, 25 App. 293.

In a murder case the defense moved to quash the indictment on the ground that the grand jury by whom it was presented was not a legal grand jury, because, at the time of the presentment of the indictment, one of the duly impaneled grand jurors was not within the jurisdiction of the court, and was domiciled in another state. *Held*, that the motion to quash was properly overruled; the legality of the grand jury was not affected by the absence of one of its members. [*Drake v. S.*, *ante*, approved on this question.] *Jackson v. S.*, 25 App. 314.

### CH. 2.—OF THE DUTIES, PRIVILEGES, AND POWERS OF THE GRAND JURY.

§1918, Art. 392 to §1929, Art. 403. See C. C. P.	§1930, Art. 404 to §1943, Art. 415. See C. C. P.
§1929a, Art. 403a. Additional process for witness issued, when. Pen- alty. <i>New.</i>	

#### §1929a—Art. 403a.—Additional process for witness is- sued, when. Penalty.

§1. From and after the passage of this act it shall be unlawful for the clerk of any district court, after a witness in a felony case

has been served with a *subpoena* or an attachment, to issue any other or further process for said witness, except upon the order of the presiding judge, made upon application to him for that purpose. When a witness has been served with process by one party it shall enure to the benefit of the opposite party in case he should need said witness, and as far as practicable the clerk shall include in one process the names of all witnesses for the State and defendant, and such process shall show that the witnesses are summoned for the State and defendant.

§2. Any district clerk who shall violate the provisions of this act shall be deemed guilty of a misdemeanor and punished by a fine of not less than ten nor more than one hundred dollars. [Act March 30, 1889; 21 Leg. p. 145.]

### CH. 3.—OF INDICTMENTS AND INFORMATIONS.

§1944, Art. 416 to §1949, Art. 420. See C. C. P.	§1991. Incorrect spelling, grammar, etc. <i>Annotated.</i>
§1950. Requisites of an indictment. Requisite 1. <i>Annotated.</i>	§1992, Art. 429 to §1998, Art. 430. See C. C. P.
§1951 to §1954. See C. C. P.	§1999. Decisions as to informations. <i>Annotated.</i>
§1955. Requisite 7. <i>Annotated.</i>	§2000, Art. 431 to §2003, Art. 433. See C. C. P.
§1956, Art. 421 to §1964, Art. 425. See C. C. P.	§2004. Election between counts; decisions as to. <i>Annotated.</i>
§1965. Decisions as to name. <i>Annotated.</i>	§2005, Art. 434 to §2012, Art. 439. See C. C. P.
§1966, Art. 426 to §1990, Art. 428r. See C. C. P.	

#### §1950. Indictment. Requisite 1.

An unnecessary written caption constitutes no part of an indictment, nor do mottoes or business cards, though unnecessary and unseemly, impair its validity. See this case in illustration. *Owens v. S.*, 25 App. 552.

#### §1955. Requisite 7.

The charging clause of the indictment, in alleging the burglarious entry, as copied into the record, reads as follows: "Then and there by force break and enter a house," etc.—omitting the essential word "did." *Held* that, if the said word is omitted in the original indictment, it is insufficient to charge burglary. Appearing, however, in the proper connection in the clause charging theft of certain articles, the indictment is sufficient as an indictment for theft. *Jester v. S.*, 26 App. 369.

The gravamen of an indictment for swindling was that the accused, by mortgaging cattle which he did not own, procured from one N. certain merchandise, etc. The mortgage was not set out *in hæc verba* nor by its tenor, and the indictment leaves it in doubt whether it charges that the accused, when he obtained the mortgage, executed and delivered the mortgage, or whether he obtained the same upon previous false representations of such ownership, and subsequently executed the mortgage as a mere security. *Held*, that the indictment is bad for uncertainty. See the opinion *in extenso*. *Hardin v. S.*, 25 App. 74.

Although the same indictment may, in some cases, include several offenders for different offenses of the same kind, by using the proper allegation to charge the offenses as several as to each, still the trial court has the discretionary power to quash such an indictment, if that mode of preferring the charges imposes any material inconvenience. The indictment in this case impleads several defendants for offenses of the same kind, to which the defendants interpose separate and

distinct defenses. Note the suggestion of the court that a separate indictment should be preferred against each of the accused. *Bennett v. S.*, 26 App. 671.

§1965. Decisions as to name.

Information, to be sufficient to charge an offense under the laws of this state, must allege the name of the accused, or must state that his name is unknown, and give a reasonably accurate description of him. Another rule is that in "alleging the name of the defendant, or of any other person necessary to be stated in an indictment or information, it shall be sufficient to state one or more of the initials of the Christian name, and the surname." The information in this case merely impleads "one Pancho," and is insufficient. *Pancho v. S.*, 25 App. 402.

The indictment alleged the name of the owner of the stolen property to be Burris. The proof showed it to be Burrows. The conviction is assailed upon the ground of variance between the ownership as alleged and proved. But *held* that, as the proof further shows that the owner was commonly known as Burris, the variance is not material. *Taylor v. S.*, 27 App. 44.

"Hix Nowels" and "Hicks Nowells" are *idem sonans*. The proof leaving no doubt that the name as spelled in the indictment was the same as that proved on the trial, the court did not err in disregarding the difference in the orthography of the name, and omitting to submit to the jury whether the names were identical. *Spoonemore v. S.*, 25 App. 358.

§1991. Incorrect spelling, grammar, etc.

Bad spelling does not vitiate an indictment or information, if the meaning of the allegation is unmistakable. Appellant was charged by information with disturbance of the "inhabitanee" of a public street. *Held* that the word *inhabitants* was obviously intended, and the two words are *idem sonans*. *Keller v. S.*, 25 App. 325.

§1999. Decisions as to information.

Information is insufficient if it fails to allege the venue of the offense. That the complaint alleges the venue will not supply the omission in the information. *Smith v. S.*, 25 App. 463.

Information, to be sufficient to charge an offense against the laws of this state, must be predicated upon an affidavit or complaint which in substance charges the same offense as that charged in the complaint. *Robinson v. S.*, 25 App. 111.

§2004. Election between counts.

It is only when distinct felonies, not of the same character, are charged in different counts of the same indictment, that the State may be required to elect upon which count it will claim a conviction. The indictment in this case charged in the first count that the accused burned his own house, the same being insured; and in the second count that he burned a house and thereby endangered the burning of other houses not belonging to him. The two said counts charge the same felony, and there was no occasion for the election by the State of one count to the exclusion of the other upon which to urge a conviction. But the charge of the court to the jury recites that the State voluntarily abandoned and dismissed the second count; notwithstanding which recital it proceeds to instruct the jury upon the law applicable to the second count. *Held*, error; but not such error as would necessitate reversal in the absence of exception, unless it was calculated to injure the rights of the accused. *Baker v. S.*, 25 App. 1.

## CH. 4.—OF PROCEEDINGS PRELIMINARY TO TRIAL.

*I.—Of enforcing the attendance of defendant, and forfeiture of bail.*

§2013, Art. 440 to §2041, Art. 456. See C. C. P.

§2042. Forfeitures set aside, when. *Annotated.*

§2043. See C. C. P.

*II.—Of the capias.*

§2044, Art. 457 to §2056, Art. 469. See C. C. P.

§2056a. Sheriff cannot make an arrest without his county. *Annotated.*

§2057, Art. 470 to §2063, Art. 476. See C. C. P.

*III.—Of witnesses, and the manner of enforcing their attendance.*

§2064, Art. 477 to §2093, Art. 503. See C. C. P.

*IV.—Service of a copy of the indictment.*

§2094, Art. 504 to §2097, Art. 507. See C. C. P.

§2098. Decision as to service of indictment. *Annotated.*

*V.—Of arraignment, and proceedings where no arraignment is necessary.*

§2099, Art. 508 to §2115, Art. 520. See C. C. P.

*VI.—Of the pleadings in criminal actions.*

§2116, Art. 521 and §2117, Art. 522. See C. C. P.

§2117a. Plea in abatement unknown. *Annotated.*

§2118, Art. 523. See C. C. P.

§2119. Decisions on motion to set aside indictment. *Annotated.*

§2120, Art. 524 and §2121, Art. 525. See C. C. P.

§2122. Decisions as to plea of former acquittal or conviction. *Annotated.*

§2123, Art. 526 to §2138, Art. 538. See C. C. P.

*VII.—Of the argument and decisions of motions, pleas and exceptions.*

§2139, Art. 539 to §2155, Art. 553. See C. C. P.

§2155a. Decisions as to effect of former conviction. *Annotated.*

§2156, Art. 554. See C. C. P.

*VIII.—Of continuance.*

§2157, Art. 555 to §2163, Art. 560. See C. C. P.

§2164. Diligence; decisions as to. *Annotated.*

§2165 to §2168. See C. C. P.

§2169. Discretion of the court to grant or refuse a continuance. *Annotated.*

§2170, Art. 561 to §2185, Art. 568. See C. C. P.

§2186. Refusal of continuance ground for new trial, when. *Annotated.*

§2187. Practice on appeal; bill of exceptions. *Annotated.*

*IX.—Disqualification of the judge.*

§2188, Art. 569 to §2198, Art. 575. See C. C. P.

*X.—Change of venue.*

§2199, Art. 576. See C. C. P.

§2200. Decisions as to change of venue. *Annotated.*

§2201, Art. 577 and §2202, Art. 578. See C. C. P.

§2203. On application of defendant. *Annotated.*

§2204, Art. 579 to §2220, Art. 591. *Annotated.*

*XI.—Of dismissing prosecutions.*

§2221, Art. 592 to §2223, Art. 593. See C. C. P.

## I.—OF ENFORCING THE ATTENDANCE OF DEFENDANT, AND FORFEITURE OF BAIL.

## §2042. Forfeitures set aside, when.

The validity of the indictment against the principal cannot be questioned by the sureties in an action against them to enforce the penalty of the bail-bond or recognizance. *Lee et al v. S.*, 25 App. 331.

The surrender or arrest of the principal in a forfeited bond *after* the rendition of judgment *nisi* will not release the sureties from their liability on the bail-bond or recognizance. The trial court is authorized, under the provisions of article 445 of the Code of Criminal Procedure, to remit, either in whole or in part, the penalty specified in the bond of recognizance if, before final judgment against

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the bail, the principal either appears or is arrested and placed in jail. *Lee et al. v. S.*, 25 App. 331.

**II.—OF THE CAPIAS.**

**§2056a. Sheriff cannot make an arrest without his county.**

The laws of this state do not authorize a sheriff to execute a warrant of arrest or a *capias* beyond the limits of the county of which he is sheriff. *Jones v. S.*, 26 App. 1.

**IV.—SERVICE OF A COPY OF THE INDICTMENT.**

**§2098. Decision as to service of indictment.**

It is provided by the statutes of this state that, in felony cases, when the accused is in custody, he is entitled to service of a copy of the indictment against him as soon as the same is presented by the grand jury, and that in all cases wherein the accused is entitled to service of a copy of the indictment, he is likewise entitled to two days after service in which to file written pleadings. The action of the trial court in this case, in forcing the defendant to trial *instantly* upon service of a copy of the indictment was error. *Woodall v. S.*, 25 App. 617.

**VI.—OF THE PLEADINGS IN CRIMINAL ACTIONS.**

**§2117a. Plea in abatement unknown.**

A plea in abatement, technically considered, is unknown to our criminal system. Independent of the two grounds enumerated in article 523 of the Code of Criminal Procedure, jeopardy and want of jurisdiction are the only grounds upon which an indictment, after its presentment, can be set aside. *Owens v. S.*, 25 App. 552.

**§2119. Decisions on motion to set aside indictment.**

Article 523 of the Code of Criminal Procedure, which controls the subject, expressly provides that an indictment can be set aside only because of one or both of the causes enumerated, *i. e.*, that the indictment was not found by at least nine grand jurors, or that some person not authorized by the law was present when the grand jury were deliberating upon the accusation against the defendant or were voting upon the same. Independent of the said statutory grounds, jeopardy and want of jurisdiction are the only other grounds upon which an indictment can be vacated or avoided. *Woods v. S.*, 26 App. 490.

**§2122. Former acquittal or conviction—Decisions as to.**

The pleas of former jeopardy or former acquittal or conviction, to be sufficient, should set out the indictment upon which the former trial was had, and the judgment rendered. It appears, however, that the two trials of this case were had in the same tribunal, and the rule is that when such is the case it is not essential that the accused shall interpose such pleas, inasmuch as the trial court will take judicial cognizance of all prior proceedings in the case.

The offense charged in this case was an aggravated assault and battery. It appears that the first trial resulted in a conviction for simple assault, but it does not appear that the judgment was entered upon said verdict. To the second trial in the same court, the accused interposed the plea of former jeopardy and conviction—omitting to set out the indictment or the judgment. The trial court (a jury being waived) found that the first verdict acquitted the defendant of aggravated assault, but not of simple assault and again adjudged defendant guilty of simple assault. The record shows the former conviction of the accused of simple assault, but it does not show whether or not judgment was ever rendered on said conviction, nor does it show whether or not the conviction was set aside without judgment. *Held*: If judgment on the first conviction was rendered, and was never legally set aside, or was set aside by the trial court of its own motion, then the former conviction, though for the inferior offense, was a bar to this one. On the contrary if the judgment was rendered on the first conviction, and the same was legally set aside, or arrested at the instance of the defendant, then the first would not be a bar to the second conviction. *Held*, further, that upon the whole case, because of uncertainty, the conviction must be set aside, and a new trial awarded. *Foster v. S.*, 25 App. 543.

Former conviction is a defense which must be *specially* pleaded, and the plea must be verified by the affidavit of the defendant. The only exception to this rule is that if the accused has been convicted of an offense inferior in degree to that charged, and the judgment has been reversed or a new trial awarded, he is

not required, when placed on trial again in the same case and the same court, to plead former acquittal of the greater offense. *Samuels v. S.*, 25 App. 537.

VII.—OF THE ARGUMENT AND DECISIONS OF MOTIONS, PLEAS AND EXCEPTIONS.

§2155a. Decisions as to effect of former conviction.

It is well settled in this state that the stealing of different articles of property, belonging to different owners, at the same time and place, so that the transaction is the same, is but one offense, and the accused cannot be convicted on separate indictments charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars a prosecution on the other.

The proof on the trial showed that the defendants had been separately convicted for the theft of a cow, the property of one W. The animal involved in this prosecution was alleged to be the property of one C., and was found in the possession of the defendants at the same time and place and under the same circumstances as the W. cow. It showed, also, that when last seen, before being found in the defendants' possession, the W. cow was on her range a mile and a half west of the town of A.; and that the C. cow, when last seen before she was found in the possession of the defendants, was on her range several miles southwest from the said town of A. Under this proof the defendants pleaded in bar to this prosecution their former conviction for the theft of W.'s cow, alleging the taking of the two cows to be but one transaction. The jury found against the truth of the special plea. *Held*, that the finding of the jury was supported by the proof, and was correct. *Willis v. S.*, 24 App. 586.

VIII.—OF CONTINUANCE.

§2164. Diligence, decisions as to.

The application for continuance recited also the absence of two material witnesses. Overruling the same for want of diligence, the trial judge explained that, although confined in the same jail with one of the absent witnesses for months, the accused had taken no steps to secure the service of process upon him; and that, although, as shown by a previous application for continuance, the defendant knew that the other witness was an incurable invalid, and unlikely ever to be able to leave his bed, he had taken no steps to secure his deposition. *Held*, that the ruling was correct. *Stouard v. S.*, 27 App. 1.

§2169. Discretion of the court to grant or refuse a continuance.

In view of the fact that all of the witnesses, save one, named in the application for continuance were either present or accessible at the time of trial, and either testified, or could have been called to testify, and that the trial court offered to postpone the trial until the arrival of the absent witness, which offer was declined by the defense, the ruling of the trial court refusing the continuance was correct. *May v. S.*, 25 App. 114.

§2186. Refusal of continuance ground for new trial, when.

Even if the absent testimony set out in an application for continuance be both admissible and probably true, it will not, if immaterial, require the award of a new trial because of the refusal of the continuance. *Peace v. S.*, 27 App. 83.

§2187. Practice on appeal. Bill of exceptions.

The refusal of the trial court to award a continuance will not be revised by this court, unless the same be presented by a bill of exceptions. *Wimbish v. S.*, 25 App. 90.

X.—CHANGE OF VENUE.

§2200. Decisions as to change of venue.

Change of venue was applied for upon the ground that the accused could not secure a fair trial by an impartial jury, because of the prejudice prevailing against him throughout the county. The proof shows that whatever prejudice existed against the accused was confined to a single section of the county, and it is made to appear that none of the jurors who tried the case resided in that section of the county. *Held*, that the refusal of the trial court to change the venue was not error. *Johnson v. S.*, 26 App. 399.

In changing the venue of his own motion the district judge is authorized to transfer the case to any county in his own or in an adjoining district. *Boyett v. S.*, 26 App. 689.



**§2203. On application of defendant.**

Change of venue was sought by the defendant in this case upon the ground that the prejudice against him in the county of the forum was so great that he could not obtain a fair and impartial trial. The affidavits of his compurgators were traversed by counter-affidavits on behalf of the State. A large number of witnesses testified *pro* and *con* as to the credibility and means of knowledge of the defendant's compurgators, and, over the objection of the defendant—who contended that the investigation should be confined solely to the credibility and the means of knowledge of his compurgators—the trial court permitted the contesting witnesses to testify directly as to the existence or non-existence of the prejudice alleged in the affidavits supporting the application for the change of venue. *Held*, that the proceeding was correct, and the objection was properly overruled. *Menly v. S.*, 26 App. 274.

## TITLE 8.—OF TRIAL AND ITS INCIDENTS.

### CH. 1.—OF THE MODE OF TRIAL.

§2224, Art. 594 to §2236, Art. 604. See C. C. P.

### CH. 2.—OF THE SPECIAL VENIRE IN CAPITAL CASES.

§2237, Art. 605 to §2256, Art. 617. See C. C. P.

### CH. 3.—OF THE FORMATION OF THE JURY IN CAPITAL CASES.

§2257, Art. 618 to §2262, Art. 621. See C. C. P.	§2282. Challenge for cause; decisions as to. <i>Annotated.</i>
§2263. Excuses; decisions as to. <i>An- notated.</i>	§2283, Art. 637 to §2293, Art. 644. See C. C. P.
§2264, Art. 622 to §2281, Art. 636. See C. C. P.	

#### §2263. Excuse of juror; decisions as to.

In the absence of a showing to the contrary, the presumption of diligence obtains in favor of an officer charged with the execution of legal process. In this case the sheriff returns two of the jurors named in the special venire as "not found." The defendant's bill of exceptions to the action of the court holding the return sufficient, fails to disclose the diligence used by the sheriff to execute the process, and hence the presumption must obtain in favor of the officer. *Livar v. S.*, 26 App. 115.

Ordinarily, the trial court cannot excuse a juror summoned upon a special venire until he has appeared and been placed upon his *voir dire*, even though the court has been apprised that he is exempt from jury service, the rule being that his excuse must be claimed and established under oath. But an exception to this rule is when the juror is sick, or so decrepit from bodily infirmity that he cannot appear to make his excuse, and in such case his excuse can be made by another, and the court can excuse him in his absence. If the defendant objects or desires to confute the ground of excuse, he should then apply for an attachment against the juror. In this case the return of the sheriff described the juror as "decrepit," and "over age." Upon this return the court excused the juror, and the defendant objected, but did not sue out process for the production of the juror in court. *Held*, that the action of the court was not error. *Livar v. S.*, 26 App. 115.

#### §2282. Challenge for cause; decisions as to.

On his *voir dire* a juror stated that, with respect to the guilt or innocence of the defendant, he had not formed nor expressed an opinion that would disqualify him to try the case; that he had formed an opinion it would require evidence to remove, but he thought he could render a verdict according to the evidence. On further examination he stated that he "had not formed such opinion as would influence his verdict, and that he could be entirely governed by the law and evidence in court." *Held*, that the juror was qualified. *Livar v. S.*, 26 App. 115.

## CH. 4.—OF THE FORMATION OF THE JURY IN CASES LESS THAN CAPITAL.

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| <p>§2294, Art. 645 to §2296, Art. 649. See C. C. P.</p> <p>§2298a. Constitutional jury in district court. <i>Annotated.</i></p> | <p>§2299, Art. 650 to §2308, Art. 659. See C. C. P.</p> |
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§2298a. Constitutional jury in district court.

**Petit jury.**—A constitutional jury for the trial of causes in the district court consists of twelve persons. *Jester v. S.*, 26 App. 369.

## CH. 5.—OF THE TRIAL BEFORE THE JURY.

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| <p>§2309, Art. 660 to §2320, Art. 668. See C. C. P.</p> <p>§2321. Argument; decisions as to. <i>Annotated.</i></p> <p>§2322, Art. 669. See C. C. P.</p> <p>§2322a. On severance, defendant not entitled to a continuance to obtain testimony of co-defendant. <i>Annotated.</i></p> <p>§2323, Art. 670 to §2336, Art. 678. See C. C. P.</p> <p>§2337. Charge must be applicable to and limited by the evidence. <i>Annotated.</i></p> <p>§2338. In felony must give all the law of the case. <i>Annotated.</i></p> <p>§2339 to §2341. See C. C. P.</p> <p>§2342. Circumstantial evidence; charge as to. <i>Annotated.</i></p> <p>§2343 to §2347. See C. C. P.</p> <p>§2348. Penalty; charge as to. <i>Annotated.</i></p> <p>§2349, Art. 679 to §2362, Art. 685. See C. C. P.</p> | <p>§2363. Reversal for error in charge, when. <i>Annotated.</i></p> <p>§2364, Art. 686. See C. C. P.</p> <p>§2365. When exception to charge must be reserved. <i>Annotated.</i></p> <p>§2366. Bills of exception must be prepared and certified, when. <i>Annotated.</i></p> <p>§2367. See C. C. P.</p> <p>§2368. Bill of exception must show what. <i>Annotated.</i></p> <p>§2369. See C. C. P.</p> <p>§2370. Bill of exception, when necessary. <i>Annotated.</i></p> <p>§2371, Art. 687. See C. C. P.</p> <p>§2372. Separation of jury in felony cases. <i>Annotated.</i></p> <p>§2373, Art. 688. See C. C. P.</p> <p>§2373a. Decisions as to separation of jury in misdemeanor case. <i>Annotated.</i></p> <p>§2374, Art. 689 to §2393, Art. 704. See C. C. P.</p> |
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§2321. Argument, decisions as to.

Special counsel for the State, in the concluding argument for the prosecution, stated to the jury that "the defense of an insult to a man's wife is set up in two-thirds of the cases in this county;" that, "when before the grand jury, the witness, Rose, made no such statement as that he picked a pistol up from the ground;" that "he knew John Collier well, and that he was an honest and truthful man," and that "John Collier left a wife and a lot of orphan children, and in their behalf you should punish the defendant;" with reference to all of which statements the trial judge instructed the jury that they were not to be considered, as they rested upon no evidence in the case. *Held*, that the instruction of the trial court was sufficient to countervail any prejudicial tendency of the said statements. *Miller v. S.*, 27 App. 63.

In his concluding argument the counsel for the defense stated to the jury that the State's counsel, in closing the case, would have something to say about why P. and W. and E. (all of whom were shown to have been indicted for the same offense) were not put upon the stand by the defense, and that the reason they were not called to the stand was that, if called, the prosecuting officer would indict them again for perjury. In reference to this matter the State's counsel, in concluding the argument, stated that all the parties named, except W., who had been convicted, could have been called to testify without danger of indictment if

they testified to the truth. *Held*, that the remarks of the State's counsel, being responsive to the argument for the defense, were legitimate. *Smith v. S.*, 27 App. 50.

**§2322a. On severance, defendant not entitled to a continuance to obtain testimony of co-defendant.**

The statute under which one of plural defendants, whether jointly or separately indicted, by filing his affidavit to the effect that he verily believes there is no evidence against his co-defendant, and that the testimony of his co-defendant is material to his own defense, may require that his co-defendant be first tried, cannot, independent of other sufficient showing, be held to operate a continuance of his case to secure the testimony of his co-defendant. When arraigned in the district court of Shackelford county, to which the venue had been changed from Stephens county, the defendant in this case filed an affidavit setting forth that Jane Stouard was charged by separate indictment with the same offense; that the indictment against Jane Stouard was still pending in the district court of Stephens county; that the testimony of the said Jane Stouard was material to his defense, and that he verily believed there was no sufficient evidence to convict the said Jane Stouard; upon which affidavit he prayed the court to order that the said Jane Stouard be first tried, and that his trial be continued in order to enable him to secure the testimony of said Jane Stouard, if acquitted. *Held*, that the court did not err in refusing to continue the case to await the trial of the co-defendant. *Stouard v. S.*, 27 App. 1.

**§2337. Charge must be applicable to and limited by the evidence.**

It is required that the charge of the court in a criminal case "shall distinctly set forth the law applicable to the case;" and the "law applicable to the case" means the case as made by the evidence. See the opinion *in extenso* for a charge of the court in a theft case *held* to be erroneous, because it rests the guilt of the accused upon a state of case not made by the proof. *Chamberlain v. S.*, 25 App. 388.

The rule is imperative that the trial court must give in charge to the jury, fully and affirmatively, the law applicable to every issue raised by the evidence, whether such evidence be produced by the State or the defense, whether it be strong or feeble, and whether it be unimpeached or contradicted. *Menly v. S.*, 26 App. 274.

Charge of the court must respond to the case as made by the proof, and must not state abstract propositions which have no foundation in the evidence. See this case in illustration. *Croell v. S.*, 25 App. 596.

Charge of the court should guard the jury from misapplying evidence which was admitted for a specific purpose only. *Rogers v. S.*, 26 App. 404.

The indictment charged that the accused kept open his retail liquor saloon on an election day, in the town of B., in precinct 5, of R. county, which said town was a voting place. The charge of the court (for which see the opinion) was so framed as to authorize a conviction if the accused kept his saloon open on the said election day, anywhere within the limits of R. county. *Held*, erroneous. *Croell v. S.*, 25 App. 755.

In a trial for murder it appeared that in a personal conflict between the defendant and the deceased the latter struck the former with his fist and knocked out a tooth, and there was evidence tending to prove that the deceased was in the act of again striking the defendant at the instant the latter shot and killed him. *Held*, that the trial court erred in omitting and refusing to give in charge to the jury the law of mayhem, and in refusing to submit to the jury the question of fact whether there had been a cessation of violence by the deceased when the fatal shot was fired, or whether he was still "mistreating with violence" the defendant. *High v. S.*, 26 App. 545.

**§2338. In felony must give all the law in the case.**

Charge of the court, applying the law of self-defense to the facts in proof, instructed the jury as follows: "If you should find from the evidence that, prior to the shooting, the deceased forcibly and without defendant's consent, seized money that was defendant's property, or that defendant fairly and reasonably believed was his property, and that deceased refused to give up such money, and that, when defendant returned to where deceased was, he returned not for the purpose of provoking a difficulty, and inflicting injury upon deceased, but, on the contrary, only for the purpose of making a demand quietly and peaceably

and unaccompanied by force, of the said Gilstrap, that the money should be returned, and if, with such purpose and intent, defendant did return to the room and quietly demand the return of such money, not intending or contemplating at the time that such demand would result in a difficulty in which death or serious bodily injury would result, then, and in such case, if the defendant afterwards shot and killed W. T. Gilstrap, it would be *either murder in the second degree or manslaughter or justifiable homicide*, according as you should find the other parts of the case under former instructions of the court." *Held* erroneous, because, while the proof called for a charge upon the hypothetical case stated, the facts, if found to be true, would make a clear case of justifiable homicide only. See the opinion for a special charge which, embodying correctly the law upon the subject, was erroneously refused.

Upon the issue of self-defense, the defendant requested the trial court to charge the jury as follows: "If you believe from the evidence that the defendant re-entered the gambling room with the intention of renewing or provoking a difficulty with the deceased in order to get a pretext to kill him, and after entering the room he declined the combat and retreated, then, under these circumstances, the defendant will not be considered to have forfeited his right of self-defense, but the same would be complete, and he would have the right to defend himself against any attack hereafter made upon him by deceased." *Held* that, the proof tending in some degree to raise the issue, it was error to refuse the charge. *Johnson v. S.*, 26 App. 631.

**§2342. Circumstantial evidence; charge as to.**

The trial court is not required to instruct the jury on the law of circumstantial evidence, unless the inculpatory evidence is altogether of that character,—which was not the condition of the proof in this case. *Clore v. S.*, 26 App. 624.

If, as in this case, the inculpatory evidence against the accused is purely circumstantial, omission of the trial court to instruct the jury upon the law of circumstantial evidence is material error. *Willard v. S.*, 26 App. 126; *Crowley v. S.*, 26 App. 578; *Willard v. S.*, 25 App. 102.

Charge of the court on circumstantial evidence was as follows: "And where, as in this case, circumstantial evidence is relied upon to sustain a conviction, each fact or circumstance necessary to establish the conclusion of guilt must be proved beyond a doubt, and the facts so proved must be consistent with each other and with the guilt of the accused, and when considered together must be so conclusive as to satisfy you beyond a reasonable doubt that the defendant is guilty as charged." *Held*, insufficient to fully state the law upon the subject—for which see *Willson's Criminal Forms*, 714. *Booker v. S.*, 26 App. 593.

In the main charge the learned trial judge gave in charge to the jury the following instruction: "The defendant is presumed to be innocent until his guilt is established by the evidence, to the satisfaction of the jury, beyond a reasonable doubt, and this case, you are also advised, depends upon circumstantial evidence, in which it is necessary that each fact tending to show the guilt of defendant, if such there be in evidence, must be consistent with every other such fact in evidence, and the whole must consist together and establish the guilt of defendant, and exclude any and every other reasonable hypothesis than his guilt, to your satisfaction, beyond reasonable doubt, to warrant his conviction; and, unless it does so, you will find the defendant not guilty." We think this clearly and precisely states the rule of the law upon this subject, and that there was no error in refusing a supplemental charge upon this branch of the case. *Jackson v. S.*, 25 App. 314.

**§2348. Penalty; charge as to.**

*Two* years in the penitentiary is the minimum term provided by law as the penalty for manslaughter. Charge of the court, therefore, which instructs the jury that *three* years is the minimum constitutes fundamental error. *Williams v. S.*, 25 App. 76.

**§2363. Reversal for error in charge, when.**

**Charge of the court in misdemeanor cases.**—Errors in the charge of the court in misdemeanor cases, unless fundamental, will not be revised on appeal, in the absence of exception or requested instructions. *Comer v. S.*, 25 App. 509.

Omissions in the charge of the court, unless excepted to, or unless the defendant seeks to supply them by special instructions, will be revised by this court only when they are calculated to prejudice the accused. *Bailey v. S.*, 26 App. 706.

**§2365. When exception to charge must be reserved.**

It is a rule of practice in this state that special instructions, whether given or refused by the trial judge, must be authenticated by his signature, and if the record fails to show that such instructions were refused, the appellate court will presume that they were given.

Special instructions are properly refused when it appears that to the extent they were correct they were embodied in the general charge. *Smith v. S.*, 27 App. 50.

To perpetuate an exception to a charge of the court, the defendant must give notice of exception at the time that the charge is delivered, but he need not specify the ground of exception until the jury has retired. He must do so, however, before the return of verdict; otherwise this court will revise only fundamental error. *Martin v. S.*, 25 App. 557.

**§2366. Bills of exception must be prepared and certified, when.**

Bills of exception, to be considered on appeal, must have been approved by the trial judge and filed in the trial court during term time, and within ten days after the trial of the case. *Frisby v. S.*, 26 App. 180.

Bills of exception in criminal are governed by the same rules as prescribed in civil cases. [Code Crim. Prac., Art. 686.] In civil cases the practice prescribed is that, after the party proposing to take the bill has reduced it to writing, he shall present it to the judge, and "it shall be the duty of the judge to submit such bill of exceptions to the adverse party, or his counsel, if in attendance on the court, and if the same is found to be correct, it shall be signed by the judge without delay, and filed with the clerk during the term." If the bill is not correct, the party or his counsel are afforded by the judge an opportunity to correct the same as the latter may suggest, and upon the refusal of the party or his counsel to make or agree to such corrections, then the judge shall make out, sign and have filed "such a bill of exceptions as will, in his opinion, present the ruling of the court in that behalf as it actually occurred." It is only where the judge has made out his own independent bill, as above provided, and filed it, that the party may controvert such bill by procuring three respectable bystanders to attest the correctness of the original bill as presented by the party to the judge. [Rev. Stats., Arts. 1363-1367.] The judge is required to sign the bill without delay after it has been submitted to the opposite party and found to be correct. We know of no rule requiring him to sign and approve it until his duties as above prescribed have been performed, viz: until he has submitted it to the adverse party and it has been found to be correct. No unnecessary delay in the action of the judge is in the slightest degree evidenced by the facts stated in the bill of exceptions; on the contrary, he appears to have been performing his duty promptly and strictly in accordance with the law. [Willson's Crim. Stats., Sec. 2369]; nor does it appear that defendant has been deprived of any of his exceptions. *Livar v. S.*, 26 App. 115.

The record showing that the bills of exception were approved and filed in term time, although filed more than ten days after the trial, the presumption obtains, in absence of a contrary showing, that they were presented to the judge within the ten days, for his approval. *Tomlin v. S.*, 25 App. 676.

**§2368. Bills of exception must show what.**

Bills of exception which relate to the competency of evidence, or to rulings of the trial court upon applications for continuance, will not be considered on appeal without a statement of such facts as are necessary to elucidate the exceptions. *Livar v. S.*, 26 App. 115.

Bill of exception reserved to the charge of the court, if too general or indefinite to point out specific objection, will not be considered on appeal; and, in the absence of a proper bill of exception, this court will examine the charge of the court below only with reference to fundamental errors or such as, under all the circumstances of the case, are calculated to prejudice the rights of the accused. *Peace v. S.*, 27 App. 83.

In this case the trial court charged upon an issue depending upon the evidence. The defendant excepted to the charge, because it was unwarranted by any evidence in the case. In his authentication of the bill of exceptions, the trial judge recites that there was no such evidence adduced on the trial, and that the evidence referred to in the charge was evidence adduced on the trial of another case. The statement of facts does not contain evidence which would war-

rant the charge, but, as the bill of exceptions controls, the charge must be held erroneous as unauthorized by any evidence on the trial. *Briscoe v. S.*, 27 App. 193.

**§2370. Bill of exception, when necessary.**

Errors in the charge of the court, unless they are presented by proper bill of exceptions, will not be revised by this court, except they be fundamental in character, or such as, under all the circumstances of the case, were calculated to injure the rights of the accused. *Wimbish v. S.*, 25 App. 90.

Objections to the admission of evidence will not be considered by this court, unless the same are perpetuated by bill of exception, properly incorporated in the transcript. *Roe v. S.*, 25 App. 33.

A party objecting to any ruling of the trial court should except to the same at the time, and, if he asks it, time should be given him in which to embody his exception in a written bill. Refusal to grant such time, if prejudicial to the party, would be reversible error. But, to bring before this court the refusal of the trial court to grant time for the preparation of the bill, exception to such action should be promptly taken, and if the court refuses the bill, the party should appeal to the bystanders. Note that in this case this rule was not observed. *George v. S.*, 25 App. 229.

**§2372. Separation of jury in felony case; decisions as to.**

The mere separation of accepted jurors, pending the completion of the jury, even though it be shown that the separated jurors conversed with outside persons while so separated, will not necessarily require the reversal of a conviction. *Bailey v. S.*, 26 App. 706.

Separation of the jury by permission of the court over defendant's objection will necessitate reversal of a conviction without reference to the question of injury to defendant. But to reverse because the jury separated without the consent of the court, it must appear that the separating juror conversed with other persons about the case or committed other misconduct to the prejudice of the accused. It is complained in this case that a juror, with consent of counsel on both sides, was permitted by the court to visit his sick wife in charge of an officer; but it appears that he did not converse with her or any one about the case. *Held*, that the objection is without merit. *Boyett v. S.*, 26 App. 691.

Upon the return of the verdict the jury was discharged, but almost immediately, and before all the jurors had left the box, the verdict was found to be informal, and the jury was replaced in the box and the verdict amended. *Held*, that no injury resulted to the defendant from this proceeding, and he has no cause to complain. *Boyett v. S.*, 26 App. 689.

**§2373a. Decision as to separation of jury in misdemeanor cases.**

In misdemeanor cases a jury may be permitted, by the court, to separate, as provided by article 688 of the Code of Criminal Procedure, but this rule does not authorize the court to reconvene a jury after it has been finally discharged, in order to remedy an informality in a verdict rendered by it, or to return another verdict. *Ellis v. S.*, 27 App. 190.

## CH. 6.—OF THE VERDICT.

§2394, Art. 705 to §2405, Art. 712. See C. C. P.

§2406. Punishment; assessment of. *Annotated.*

§2407 to §2409. See C. C. P.

§2410. When offense of different degrees is charged. *Annotated.*

§2411, Art. 714 to §2415, Art. 717. See C. C. P.

§2415a. On trial of joint offenders, separate penalties assessed. *Annotated.*

§2416, Art. 718 to §2422, Art. 724. See C. C. P.

**§2406. Punishment; assessment of.**

A verdict against joint offenders on a joint trial, to be valid, must assess a separate penalty against each offender. [*Flynn v. S.*, 8 Texas Ct. App. 389, and *Matlock et al. v. S.*, 25 *id.* 716, and *Cunningham v. S.*, 26 *id.* 83, approved.] *Medis & Hill v. S.*, 27 App. 194.

**§2410. Where offense of different degrees is charged.**

Aggravated assault and battery necessarily includes simple assault and battery. An accused on trial for the former of these offenses cannot be heard to complain that, notwithstanding proof to sustain the offense charged, he was convicted of the inferior degree. *Foster v. S.*, 25 App. 543.

**§2415a. On trial of joint offenders, separate penalties assessed.**

Upon the trial of joint offenders, if the same results in conviction, the verdict must assess separate penalties, and the judgment must conform to such verdict. The verdict in this case reads as follows: "We, the jury, find the defendants guilty as charged, and assess the fine at one hundred dollars;" to which verdict the judgment conforms. *Held*, that the verdict assesses a joint penalty, and that the judgment is not legal. *Cunningham v. S.*, 26 App. 83.



## CH. 7.—OF EVIDENCE IN CRIMINAL ACTIONS.

*I.—General rules.*

- §2423, Art. 725 to §2426, Art. 727. See C. C. P.  
 §2427. Reasonable doubt; meaning of. *Annotated.*  
 §2428. See C. C. P.  
 §2429. Reasonable doubt; charges as to. *Annotated.*  
 §2430 to §2432, Art. 729. See C. C. P.  
 §2433. Discussion of evidence by the judge. *Annotated.*

*II.—Of persons who may testify.*

- §2434, Art. 730. See C. C. P.  
 §2434a, Art. 730a. Defendant in criminal action permitted to testify. *New.*  
 §2435. Decisions as to competency of witness. *Annotated.*  
 §2436, Art. 731. See C. C. P.  
 §2437. Decisions as to competency of principals, etc., as witnesses. *Annotated.*  
 §2438, Art. 732 to §2442, Art. 735. See C. C. P.  
 §2443. Decision as to competency of husband or wife as a witness. *Annotated.*  
 §2444, Art. 736 to §2451, Art. 741. See C. C. P.  
 §2452. Complicity must be proved. *Annotated.*  
 §2453. Accomplice testimony must be corroborated. *Annotated.*  
 §2454 to §2456, Art. 742. See C. C. P.

*III.—Evidence as to particular offenses.*

- §2457, Art. 743 to §2460, Art. 746. See C. C. P.  
 §2460a. Conviction of perjury not had on circumstantial evidence. *Annotated.*  
 §2461, Art. 747. See C. C. P.

*IV.—Of dying declarations and of confessions of the defendant.*

- §2462, Art. 748. See C. C. P.  
 §2462a. Dying declarations evidence, when. *Annotated.*  
 §2463, Art. 749 and §2464, Art. 750. See C. C. P.  
 §2465. Confession; definition of. *Annotated.*

- §2466 to §2469. See C. C. P.  
 §2470. Confession made while in confinement. *Annotated.*  
 §2471 to §2473. See C. C. P.  
 §2474. Confinement; custody; what constitutes. *Annotated.*  
 §2475. Caution; decision as to. *Annotated.*  
 §2476 to §2478. See C. C. P.  
 §2479. Confession by other than defendant; decisions as to. *Annotated.*

*V.—Miscellaneous provisions.*

- §2480, Art. 751 to §2488, Art. 756. See C. C. P.  
 §2488a. Defendant not entitled to an interpreter. *Annotated.*  
 §2489. See C. C. P.  
 §2490. Judicial knowledge. *Annotated.*  
 §2491 and §2492. See C. C. P.  
 §2493. Instances of relevant evidence. *Annotated.*  
 §2494. Instances of irrelevant evidence. *Annotated.*  
 §2495 and §2496. See C. C. P.  
 §2497. Primary and secondary evidence; rules as to. *Annotated.*  
 §2498. See C. C. P.  
 §2499. Hearsay evidence; decisions as to. *Annotated.*  
 §2500 and §2501. See C. C. P.  
 §2502. Opinions as evidence; decisions as to. *Annotated.*  
 §2503. Conspirators; acts and declarations of evidence, when. *Annotated.*  
 §2504 to §2506. See C. C. P.  
 §2507. Documentary evidence. *Annotated.*  
 §2508. See C. C. P.  
 §2509. Reproducing testimony of a deceased witness. *Annotated.*  
 §2510. Examination of witnesses and introduction of evidence. *Annotated.*  
 §2511. Cross-examination. *Annotated.*  
 §2512. See C. C. P.  
 §2513. Impeachment of witness. *Annotated.*  
 §2514 and §2515. See C. C. P.  
 §2516. Bill of exceptions. *Annotated.*

## I.—GENERAL RULES.

## §2427. Reasonable doubt, meaning of.

Upon the defense of *alibi*, as applied to the alleged principal, the charge of the court required the jury to believe that the alleged principal was not present at the time and place of the killing. *Held*, error, because the effect of such charge was to eliminate from the defense of *alibi* the doctrine of reasonable doubt. *Crook v. S.*, 27 App. 198.

**§2429. Reasonable doubt, charge as to.**

On the question of reasonable doubt, the court charged as follows: "It is not sufficient, to secure a conviction, for the State to make out a *prima facie* case, but the guilt of the defendant must be shown beyond a reasonable doubt; and the failure or inability of the defendant to show his innocence does not lead any additional probative force to the incriminative facts, if any, shown by the State, or raise any presumption of guilt against the defendant." This charge, though abstractly correct, was calculated to lead the jury to believe that, in the opinion of the court, the defense had failed to show innocence. A reasonable doubt of guilt, independent of exculpatory proof, entitles an accused to an acquittal.

The court further instructed the jury that "the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and, if upon the whole evidence you have a reasonable doubt of his guilt, you must acquit him, and not resolve the doubt by a mitigation of the punishment." This charge is objectionable in that the concluding clause may have induced the jury to inflict the greatest penalty instead of the milder one provided by the statute. In charging reasonable doubt, the trial court should follow the language of the statute. *Johnson v. S.*, 27 App. 163.

See this case for evidence held insufficient to support a conviction for horse theft, because it does not overcome the presumption of innocence nor exclude the reasonable doubt. *Reveal v. S.*, 27 App. 57.

**§2433. Discussion of evidence by the judge.**

Expressions of the trial judge, in the presence of the jury, with reference to the cogency of the evidence, if prejudicial to the defendant, and exception is promptly reserved, constitute cause for reversal. Pending the discussion in the presence of the jury, of the admissibility in evidence of the declarations of an alleged co-conspirator, the trial judge interjected questions to counsel which clearly intimated that, in his opinion, a conspiracy had been sufficiently established to admit the evidence; to which action of the judge the defendant promptly excepted. *Held*, material error. The jury should have been retired pending the discussion and the ruling on the question. *Crook v. S.*, 27 App. 193.

**II.—OF PERSONS WHO MAY TESTIFY.****§2434a.—Art. 730a.—Defendant in criminal action permitted to testify.**

Exception four (4) to article 730, chapter 7, title 8, of the Code of Criminal Procedure of the State of Texas be, and the same is hereby, repealed, and that hereafter any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause; *provided*, that where there are two or more persons jointly charged or indicted, and a severance is had, the privilege of testifying shall be extended only to the person on trial. [Act April 4; July 6, 1889; 21 Leg. p. 37.]

**§2435. Decisions as to competency of witness.**

A person convicted of felony, unless such conviction has been legally set aside or he has been granted a legal pardon, is disqualified to testify as a witness in judicial proceedings.

The sentence, under the laws of this state, is an essential element to constitute a complete conviction, such as will work to the convict a forfeiture of his civil rights. Under this rule the civil rights of a person against whom a verdict for felony has been returned, and a judgment thereon entered in the court below, but upon whom the sentence has not been pronounced, is not affected, and he is competent to testify as a witness in the courts of this state. See the opinion on the question. *Arca v. S.*, 26 App. 193.

**§2437. Decision as to competency of principals, etc., as witnesses.**

A person charged, either in the same or another indictment, with participation in the offense on trial, is not competent to testify in behalf of the accused. It appears in this case that the witness proposed by the defense was indicted, by an incorrect name, for the same offense. *Held*, that the proposed witness was properly held incompetent. *Anderson v. S.*, 27 App. 177.

A conviction for driving stock from its accustomed range with intent to defraud the owner, etc., whether the punishment assessed be a term in the penitentiary or the alternative one of fine, is a conviction for felony. In this case the defendant offered as a witness one A., who had been separately indicted for the same theft, and convicted of driving stock from its accustomed range, and his penalty affixed at a pecuniary fine. The State objected to the witness upon the ground that he was a convicted felon, and that he had not paid the fine assessed against him as penalty. The trial court sustained the objection, notwithstanding sentence had not been pronounced upon the judgment. *Held* that, the penalty being a pecuniary fine only, the sentence was not essential to complete the conviction so far as to disqualify the witness, and the trial court did not err in holding him incompetent. Moreover, though separately indicted, the proposed witness was indicted as a principal to the same offense, and unless he had been acquitted was not competent to testify in behalf of the defendant. Note that *Hurt*, Judge, concurring in the ruling as to the incompetency of the proposed witness, dissents as to his conviction for driving stock from the range, etc., with penalty assessed at a pecuniary fine, being a conviction for felony. *Woods v. S.*, 26 App. 490.

A person who, although a participant and a principal in the offense for which the accused is on trial, is, if he has never been charged with the offense by indictment or information, a competent witness for the accused. *Brooks v. S.*, 26 App. 87.

A witness, to be incompetent to testify in behalf of a defendant upon the ground that he was under indictment for the same offense, must appear to have been indicted for participation in the very same criminal act for which the defendant is being tried. It will not suffice to disqualify him that he is indicted for a similar offense. The defense in this case offered a witness by whom to prove an *alibi*. The witness was rejected, upon the State's motion, upon the ground that he was charged by a separate indictment with the same offense. The *onus* of establishing incompetency by, showing that the indictment against the witness covered the same criminal act for which the defendant was on trial rested on the State; and, the State failing to establish that fact in this case, the presumption obtained in favor of the competency of the witness, and the ruling of the court, was error. *Day v. S.*, 27 App. 143.

**§2443. Decision as to competency of husband or wife as a witness.**

The husband or wife is competent to testify for the other in a criminal prosecution, but not for the State, unless the prosecution be for an offense committed by the one against the other. This rule is not relaxed by a mere separation of the spouses without a legal severance of the marriage relation. *Johnson v. S.*, 27 App. 135.

**§2452. Complicity must be proved.**

If the proof tends to raise the question whether or not a State's witness is an accomplice in the offense on trial, can the trial court, in any state of case, refuse to submit to the jury the question of accomplice *vel non*, together with proper instructions upon the corroboration of accomplice testimony? If so, it must not only be because the proof that the witness is an accomplice is meagre, but because the other proof in the case tends strongly to show that he is not. The proof in this case fairly mooted the complicity of the two State's witnesses, the trial court erred in refusing to instruct the jury upon the law of accomplice testimony. *Hines v. S.*, 27 App. 104.

**§2453. Accomplice testimony must be corroborated.**

The principle is well settled that a conviction for crime cannot be had upon the uncorroborated testimony of an accomplice. See the statement of the case for evidence *held* sufficient not only to corroborate the testimony of the accomplice, but, independent of the accomplice testimony, sufficient to support a capital conviction for murder. *Bailey v. S.*, 26 App. 706.

A conviction based upon the uncorroborated testimony of an accomplice cannot stand. See the statement of the case for the substance of evidence held insufficient to support a conviction for hog theft. *Smith v. S.*, 27 App. 196.

See the statement of this case for evidence held insufficient to support a conviction for murder of the second degree, because it rests upon the testimony of an insufficiently corroborated accomplice. *Stouard v. S.*, 27 App. 1.

The rule that, in rape cases, requires that if the other proof in the case tends to raise the issue of the female's consent to the carnal act, she becomes so far an accomplice that, in order to warrant a conviction based upon her testimony, she must be corroborated, applies to sodomy cases; and if the evidence tends to show the consent of the prosecuting witness to the act of bestiality committed upon him, he must be corroborated. The proof in this case tends strongly to show the consent of the alleged injured party, who, upon the main issue, was the State's principal witness; and in failing to instruct the jury with regard to the corroboration of an accomplice, the trial court erred. *Medis v. S.*, 27 App. 194.

If the evidence adduced on a criminal trial tends to raise the issue of the complicity of a State's witness in the commission of the offense, it becomes the duty of the trial court, independent of the strength or weakness of such evidence, to instruct the jury upon the law applicable to accomplice testimony. The proof in this case raising such issue, the trial court erred primarily in omitting to instruct the jury upon it, and again in refusing the special charge requested by the defense to supply such omission. *Hamilton v. S.*, 26 App. 206.

### III.—EVIDENCE AS TO PARTICULAR OFFENSES.

#### §2460a. Conviction of perjury not had on circumstantial evidence.

A conviction for perjury cannot be had upon purely circumstantial evidence. There may, however, be evidence technically circumstantial, yet virtually direct and positive. See the opinion in illustration.

A conviction for perjury can be had, in this state, only upon the testimony of two credible witnesses, or of one credible witness, strongly corroborated by other evidence, as to the falsity of the defendant's statements, under oath, or upon the confession of the defendant in open court. *Maines v. S.*, 26 App. 14.

A "credible witness," as used in the statute, means "one who, being competent to give evidence, is worthy of belief." *Wilson v. S.*, 27 App. 47.

### IV.—OF DYING DECLARATIONS AND OF CONFESSIONS OF THE DEFENDANT.

#### §2462a. Dying declarations evidence, when.

If a dying declaration was reduced to writing when made, it is not competent for the prosecution to prove it by parol without accounting for the non-production of the writing. The effect of this rule cannot be avoided by the statement of the witness that the declaration as a whole was first made orally to him by the deceased, and that he then immediately reduced it to writing, and the deceased signed the writing. In other words, the declaration having been reduced to writing by the witness immediately after it was made by the deceased, and then signed by the deceased, the writing cannot be ignored and the testimony of the witness be applied to the narrative of the deceased immediately before it was reduced to writing. See the opinion on the question. *Drake v. S.*, 25 App. 23.

As part of the predicate upon which the dying declarations of deceased were admitted, a witness was allowed to testify that the deceased, just before his death, called for his written statement, and that either the original writing or a newspaper copy of the same was produced and read to him, and that in reply to the question whether or not it was correct, the deceased said that it was substantially correct, but that there were some immaterial alterations he would like to make, but was too weak to do so; which alterations were never made. Held that, in view of this testimony, the proof of the dying declarations was erroneously admitted. The rule is that, "if it appears that the declarations were intended by the dying person to be connected with and qualified by other statements material to the completeness of the narrative, and that this was prevented by interruption or death, so that the narrative was left incomplete and partial, the evidence is inadmissible."

A witness for the defense having denied on his cross-examination that he made certain statements about the homicide, after the homicide was committed, the

State introduced four witnesses, who testified that the said witness did make the statements imputed to him. *Held*, that the testimony of the four State's witnesses was impeaching and not cumulative evidence, and that the failure of the trial court to properly limit it by the charge was error. *Drake v. S.*, 25 App. 293.

**§2465. Confession, definition of.**

The perjury assigned against the accused was an alleged false statement made by him as a witness for the defense on the trial of one C. for the murder of one J. The State was permitted to produce in evidence the statements of the accused as a witness at the inquest upon the body of the said J., and also his subsequent statement to one H. with respect to the killing of J. by C. *Held*, that the evidence was competent as bearing directly upon the falsity of the statements upon which the perjury was assigned. *Cordway v. S.*, 25 App. 405.

A promise on the part of an accused to pay the owner for the alleged stolen property, although a circumstance that will tend to establish his guilt of the theft, is not a confession that he took the property, and hence is not a confession of theft. *Willard v. S.*, 26 App. 126.

The State having proved that, on the day after the killing of J. by C., the accused told one H. that J. was unarmed when he was killed by C., the defense proposed, but was not allowed to prove, that two or three days subsequent to the homicide he told one McM. that J. had a pistol in his hand when he was shot and killed by C. *Held*, that exclusion of the proposed evidence was correct. *Cordway v. S.*, 25 App. 405.

**§2470. Confession made while in confinement.**

The confession of an accused, made by him when under restraint, or that has been extorted from him by violence or persuasion, cannot be used by the State in evidence against him. An exception to this rule is when, in connection with such confession, the accused makes a statement of facts which is subsequently found to be true, and which conduces to establish his guilt of the offense for which he is on trial. [Code Crim. Pro., Art. 750]. See this case in illustration.

The exception above stated is not violative of section 10, of article 1, of the Constitution of this state. That section of the Constitution could be interposed to protect an accused against compulsion to give evidence as a witness against himself. *Brown v. S.*, 26 App. 308.

**§2474. Confinement, custody, what constitutes.**

To the competency as evidence of the defendant's certain statements it was objected that he was in custody when he made them, and that he was not cautioned that they might be used against him. But it appears that the defendant, when he made the statements, was confined merely as a sequestered witness, and that, although he was suspected of complicity in the offense, he was not shown to be aware of the suspicion against him. *Held*, not to constitute the custody contemplated by the rule invoked. *Boyett v. S.*, 26 App. 689.

The confession of an accused, made after arrest and while in custody, if voluntarily made after due caution that it may be used in evidence against him, is competent for the State, even though it was elicited by the questions of the prosecuting attorney. See the opinion on the question as applied to this case. *Bailey v. S.*, 26 App. 706.

**§2475. Caution; decision as to.**

Admonishment of the accused by the magistrate at the time of the former's examining trial that he was at liberty to make a voluntary statement, but that the same could be used against him on his trial, is not such a caution as will apply to confessions made at other times and places and to other persons while the accused was in arrest. And while it is not essential that the caution shall immediately precede the confession, in order to qualify it as evidence for the State, the confession, to be admissible, must follow the caution within a reasonable time. See the opinion *in extenso*, and the statement of the case for declarations of the accused which, partaking of the nature of a confession, were made in arrest without due caution, and were, therefore, erroneously admitted in evidence. *Baker v. S.*, 25 App. 1.

**§2479. Confession by other than defendant; decisions as to.**

Declarations of an accomplice, made pending the commission of the offense, and in the absence of the accused, are not admissible in evidence against the lat-

ter, in the absence of evidence of a conspiracy between the two to commit the offense. *Martin v. S.*, 25 App. 557.

Declarations of an accomplice made in the absence of the accused and *after* the consummation of the offense, are not admissible against the accused. *Martin v. S.*, 25 App. 557.

The separate confessions of joint defendants, though admissible on their joint trial, only affect the makers respectively and severally. But if the prosecution be for a misdemeanor, the omission of the court to charge the jury upon this doctrine is not error, unless such charge be requested. *Perigo & Pearl v. S.*, 25 App. 533.

**§2481. When part of an act, declaration, etc., is given in evidence, the whole may be required; decision.**

The prosecution having proved by certain ladies the statements concerning the homicide made to them by defendant soon after the homicide, the defense proposed to prove a different statement made by the defendant to his brother when they met on the night of but after the homicide, and also the fact that he then told his brother that he had made different statements to the ladies, and explained to him the reasons which influenced him in making the said different statements to the ladies. *Held*, that the exclusion of the proposed evidence was error, inasmuch as it clearly came within the purview of article 751 of the Code of Criminal Procedure, which provides that "when a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." *Bonnard v. S.*, 25 App. 173.

#### V.—MISCELLANEOUS PROVISIONS.

**§2488a. Defendant not entitled to an interpreter.**

The statute which provides an interpreter for a witness who is unable to speak the English language, cannot be construed to require of the court an interpreter for the use of a non English speaking defendant. *Livar v. S.*, 26 App. 115.

**§2490. Judicial knowledge.**

The courts of this state take judicial notice of the boundaries and limits of counties, and of their relation or contiguity to each other. See the opinion *in extenso* for proof *held* sufficient to support an allegation of venue; and the statement of the case for evidence *held* sufficient to support a capital conviction for murder. *McGill v. S.*, 25 App. 499.

**§2493. Instances of relevant evidence.**

Evidence of contemporaneous theft of other property at the time and place of the theft in issue, is admissible, but such proof should be limited to its legitimate purpose by a proper charge. *Reno v. S.* 25 App. 102.

**§2494. Instances of irrelevant evidence.**

In a prosecution for murder the State was permitted to prove that the deceased was a cripple, and that he received the gunshot wound which crippled him while serving in the Confederate army. *Held*, that, inasmuch as the purpose of the proof was not to counteract damaging testimony affecting the character of the deceased as a peaceable citizen, it was irrelevant and prejudicial to the defendant and should not have been admitted. *Irvine v. S.*, 26 App. 37.

**§2497. Primary and secondary evidence; rules as to.**

The proof being that the deceased and one King were sitting in juxtaposition when the fatal shot was fired from ambush, and the theory of the State being that the defendant fired the said shot from a gun secured by him from the house of one Frances Graybill, on the evening of the homicide, the defense objected that the State should have been compelled to produce or account for the testimony of King and said Frances as the best evidence in the case—King being present when deceased received the wound and Frances Graybill being at home, as shown by the proof, when the defendant arrived at the house shortly before the killing. But *held* that, the proof failing to show that King could testify to any material fact, and showing that Frances Graybill was absent from her house after the arrival of the defendant long enough for him to have taken the gun without her knowledge, the objection is without merit. See the statement of the case for evidence *held*, though circumstantial, to be sufficient to support a conviction for murder in the second degree. *Breedlove v. S.*, 26 App. 445.

**§2499. Hearsay evidence; decisions relating to.**

A State's witness testified that, at the instance of the agent of the alleged owners of the stolen animals, he went to the city of Memphis, and there found certain cattle in the brand of the alleged owners, and without having otherwise identified the animals, he further testified, over objection by the defense, that he sold the said animals under a power of attorney from the alleged owner, and delivered the proceeds of the sale to the agent for the alleged owners. *Held*, that the proof was *res inter alios acta*, and irrelevant, and, tending to prove the issue of ownership, its admission was material error. *Byrd v. S.*, 26 App. 374.

Without having shown the statement to be authorized by the accused, the State proposed to prove by the sheriff the statement of the accused's brother to him, that the accused intended to plead guilty when brought to trial, and the defense objected that the testimony was hearsay. Thereupon the county attorney stated that he would legalize the said testimony by subsequent evidence, but, when interrogated by the court, he declined to disclose the facts to be subsequently proved. Notwithstanding this action of the county attorney, the trial court admitted the evidence, and the defendant reserved exception. *Held*, that the trial court erred primarily in admitting the incompetent testimony upon the equivocal statement of the county attorney, and again by its subsequent failure to withdraw it from the jury. *Rushing v. S.*, 25 App. 607.

The State's witness, Holman, testified, on the trial of the accused as an accomplice to murder, to the acts, declarations and statements of one Harris, and a conversation between him, the witness, the said Harris, and the alleged principal, to all of which the accused objected upon the ground that he was not present at any of the times testified about, and that it had not been shown that a conspiracy to commit murder existed between him and the said parties. *Held*, that this proof in this case was clearly hearsay, and was inadmissible, except upon the predicate of the existence of such a conspiracy. Whether the proof sufficiently established the predicate was, primarily, a question to be determined by the court; but, the evidence clearly presenting the sufficiency of the predicate as an issue in the case, the trial court erred in failing to submit that issue to the jury, with instructions to disregard the evidence admitted, unless the predicate was established by other proof. In the same connection the court should have instructed the jury that a conspiracy cannot be established by the acts or declarations of a co-conspirator, made after the consummation of the offense and in the absence of the defendant. See the opinion for a special charge on the subject, which being correct and demanded by the proof, was erroneously refused. *Crook v. S.*, 27 App. 198.

The defense offered to prove by the witness N. the statement made to him by one D. to the effect that the gun with which it was claimed by the State the killing was done was found by D. at a certain place, which proof, upon objection by the State, was excluded as hearsay. *Held*, that the ruling was correct. *Crook v. S.*, 27 App. 198.

**§2502. Opinions as evidence; decisions as to.**

It is competent, on a trial for selling intoxicating liquor to a minor, for a witness to testify to the physical marks of age of the alleged minor, but it is not competent for the witness to express his opinion as to how such physical marks of age would impress others. Whether or not the accused knew the purchaser of the liquor to be a minor, was a question for the jury to solve. *Walker v. S.*, 25 App. 448.

It is competent for a witness, in detailing the facts of a transaction, to state the impressions they made upon his mind at the time they occurred, unless such impressions be purely conjectural or too remote. See the opinion for the "impressions" of a witness admitted as evidence *held* under the above rule to be purely conjectural; wherefore the trial court erred in refusing to exclude them. *Irvine v. S.*, 26 App. 37.

**§2503. Conspirators; acts and declarations of evidence, when.**

Before an accused can be bound by statements inculcating him in the commission of an offense, the prosecution must show that he was present when the statements were made, or with reasonable certainty that he heard them. The proof shows that the appellant and S. and V. were detected in the act of skinning a stolen cow, and that, subsequently, when S. and V. were arrested, they declared that defendant, if anybody, was the thief; but the proof fails to show that the

defendant was either present or heard the statement. *Held*, that the statement of S. and V. was erroneously admitted in evidence.

Even if the other proof in the case was sufficient to establish an unconsummated conspiracy between the defendant and S. and V., the statement of the latter as above set forth was not admissible in evidence, because it was in no degree an act in furtherance of the common design. *Bookser v. S.*, 26 App. 593.

**§2507. Documentary evidence.**

The record of a brand is not admissible as evidence of ownership, in a trial for cattle theft, unless the same has been recorded; and the record is not sufficient, unless it designates the part of the animal upon which it is to be placed. But the statute controlling the subject cannot be construed to mean that the record shall designate the particular right or left side, shoulder, flank or hip, as the case may be, of the animal upon which the brand is to be placed. It was sufficient in this case that the record of the brand showed that it was to be placed on the "hip, thigh and flank." *Thompson v. S.*, 25 App. 161.

In a trial for cattle theft the State relied wholly on the brand found upon the animal for proof that the animal belonged to the person whom the indictment alleged to be the owner, but failed to prove that the brand had been duly recorded. A bill of exceptions reserved by the defense shows that the defense objected to a record of the brand adduced by the State, but does not set out the record of the brand nor allege that it was put in evidence over the objections made to it by the defense. *Held*, that the evidence wholly fails to sustain the allegation of ownership made by the indictment, and consequently fails to support the verdict and judgment of conviction. *Burke v. S.*, 25 App. 172.

**§2509. Reproducing testimony of a deceased witness.**

If unable to repeat the language of the deceased witness, the witness called to reproduce his evidence may, under the rule which obtains in this state, testify to the substance of his testimony. *Potts v. S.*, 26 App. 663.

**§2510. Examination of witnesses and introduction of evidence.**

Trial courts are invested with discretion to admit evidence at any stage of a trial before the conclusion of argument, and the exercise of such discretion will be revised on appeal only when such discretion has been abused to the prejudice of the accused. *Testard v. S.*, 26 App. 260.

**§2511. Cross-examination.**

The extent and character of a cross-examination is left largely to the discretion of the trial judge, and ordinarily will not be revised on appeal—no abuse of judicial discretion nor injury to the accused being apparent of record. *Brookin v. S.*, 26 App. 121.

The proof on a trial for rape was in direct conflict as to the identity of the defendant as the person who committed the offense. A defense witness having testified to facts tending to establish in favor of the defendant a case of mistaken identity, the State, over objection of defendant, was permitted to interrogate the witness as to whether or not, subsequent to the alleged offense, he received from the defendant a letter confessing his guilt, and making a statement concerning, and asking information about the commission of the offense. In permitting this manner of examination the court erred, because, *first*, if, as manifest, the purpose of the State was to prove that the witness received from defendant a letter written by him and confessing his guilt, it should first have summoned the witness with a *subpoena duces tecum* to produce the letter in court. Failing then to produce the letter, the witness might be examined to prove the reception by him of such a letter, and that to his knowledge it was written by defendant. But then the contents of the letter could not be proved by the witness without proof of the loss or destruction of the same; *second*, if the object of the State was to impeach the witness, then the fact whether or not he had received a letter from the defendant was the only fact about which the predicate was allowable, and, the witness having answered that question in the negative, the limit of the investigation was reached, under the rule that "when a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question." This rule was further violated in this case by permitting the State to contradict the witness by another witness, as to the letter. *Johnson v. S.*, 27 App. 163.



**§ 513. Impeachment of witness.**

The defense, on a trial for murder, offered, but was not allowed to prove that, on the night before the homicide, a difficulty occurred between the defendant and the principal witness for the prosecution; that when the said witness, having followed the defendant a certain distance, was told by him to stop, the said witness turned off and at the same time threatened to see the defendant again and shoot him. *Held*, that the proposed evidence was admissible under the rule that an accused on trial is entitled to prove the hostility and *bias* of the witnesses against him, so that the same may be considered by the jury in passing upon the credibility of the witnesses. *Bonnard v. S.*, 25 App. 173.

The rule is well settled that a witness may be discredited by proving that on a former occasion he made statements inconsistent with his statements on the trial. The purpose of such contradictory evidence is not, as charged by the court in this case, merely to test the general credibility of the witness, but to attack the truth of his statement on the particular trial, and the jury have the right to consider it for that purpose. See the opinion for a charge on the subject *held* erroneous. *Howard v. S.*, 25 App. 686.

A prosecuting witness having testified to certain inculpatory facts, the defense sought to impeach him by proving that he had made statements contradictory of his testimony on the trial. Thereupon, over objection by the defense, the State was permitted to introduce evidence in support of the good general reputation of the witness for truth and veracity. *Held*, that the action of the court was correct, especially in view of the showing that the impugned witness was a stranger in the county of the trial. *Crook v. S.*, 27 App. 198.

A witness introduced by the State having testified to facts tending to support the defense, the State, over the objection of the defendant, introduced evidence to impeach its said witness. *Held*, that such practice was correct, but the omission of the trial court to charge the jury that such impeaching testimony could only be considered as affecting the credibility of the witness was error. *Williams v. S.*, 25 App. 76.

Evidence to sustain the reputation of a witness for truth and veracity is not admissible when the good character of the witness in that respect has not been directly assailed. A mere conflict between the evidence of the witness and that of other witnesses does not authorize evidence to support character. *Rushing v. S.*, 25 App. 607.

Two rules apply to and govern impeaching and sustaining testimony. *First*, the inquiry must be restricted to the general character of the witness sought to be impeached. *Second*, impeaching or sustaining witnesses must speak from the general reputation, and not from their private opinions, as to whether the character of the impeached witness is good or bad for truth, or as to whether the general reputation of the impeached witness is such as to entitle him to credit on oath. See the opinion *in extenso* for a course of interrogation in a trial for murder *held* to be subversive of these rules. *Griffin v. S.*, 26 App. 157.

It is only when a witness has been properly impeached as to his truth and veracity that it is proper for the court to instruct the jury with reference thereto; and, as bad character for truth, to be a disqualifying fact, must be notorious in the neighborhood of the witness' residence, it should be proved by more than one discrediting witness—a single discrediting witness being neither sufficient nor satisfactory. *Rider v. S.*, 26 App. 334.

**§2516. Bill of exceptions.**

Bill of exception to the admission of evidence must disclose the ground of objection; otherwise it is not entitled to be considered on appeal. *Hughes v. S.*, 27 App. 127.

Bill of exception to the refusal of the trial court to permit the defense to ask a given question of a witness is not sufficient to bring the action of that court in review, unless it discloses the purpose of the question or the answer expected to be elicited thereby. *May v. S.*, 25 App. 114.

## CH. 8.—OF THE DEPOSITIONS OF WITNESSES AND TESTIMONY TAKEN BEFORE EXAMINING COURTS AND JURIES.

§2517, Art. 757 to §2534, Art. 774. See | §2535. Decisions as to depositions.  
C. C. P. | Annotated.

### §2535. Decisions as to depositions.

In order to render admissible the written testimony of an absent witness taken before an examining court, the predicate must clearly conform to the provisions of articles 772, 773 and 774 of the Code of Criminal Procedure.

Removal of the witness from the state was the ground upon which the written testimony was admitted in this case. The predicate upon which it was admitted was the affidavit of the prosecuting counsel to the effect that he had good reason to believe that the witness had removed beyond the limits of the state, and that he had caused attachments for the witness to be issued to all of the counties in the state, all of which attachments had been returned not executed. *Held*, insufficient as proof of the removal of the witness beyond the limits of the state.

Circumstantial evidence may be resorted to for the purpose of establishing the removal of a witness from the state, in order to the admission of his evidence given before the examining court, but, to be sufficient, it must be clear and convincing on the issue. *Martinas v. S.*, 26 App. 91.

As a predicate for the oral reproduction of the testimony given before an examining court by a since deceased witness, the State proved the death of the witness, and that in all probability the record of his testimony had been destroyed by a fire which consumed other records deposited in the court-house. *Held*, that the predicate was sufficient. *Potts v. S.*, 26 App. 663.

Article 586 of the Code of Criminal Procedure requires that the clerk, in case of a change of venue, shall, before transmitting the original papers in the cause, make a correct copy of the same, to be preserved in his office, etc. *Held*, that the record of testimony before the examining court, and delivered to the clerk by the magistrate who held the said court, is not "an original paper" within the meaning of the statute, and, therefore, is not a paper of which the clerk is required to keep a copy, and, for that reason, it is not a valid objection that, before resorting to parol reproduction of the testimony of the deceased witness, the State should first have produced a certified copy of said testimony from the clerk of the court whence the venue was changed, or account for its non-production. *Byrd v. S.*, 26 App. 374.

As a predicate for the introduction in evidence of the written testimony of one T. as delivered at the examining trial, it was proved that the said T. resided in the Indian Territory at the time of the examining trial and at the time of this trial. *Held*, that the predicate was sufficiently established. *Crook v. S.*, 27 App. 198.

An essential part of the predicate whereunder it is competent to reproduce, on trial, by oral proof, the evidence delivered upon the examining trial by a witness who has since died, and the record of whose testimony has been lost, is affirmative proof not only that the defendant was present as the party on trial at the examining trial, but that he was afforded the opportunity to cross-examine the witness. Failing in this latter respect, the predicate in this case was insufficient, and the trial court erred in admitting the reproducing testimony. *Byrd v. S.*, 26 App. 374.

As a sufficient predicate for the reproduction on this trial of the testimony of D. B. Carmichael, as delivered at the inquest upon the body of the deceased, the State proved by S. P. Hardwicke that, as county attorney, he interrogated said Carmichael at the said inquest, and by direction of the justice of the peace reduced his testimony to writing, to which Carmichael subscribed. The defendant was present and was offered an opportunity to cross-examine the witness, Carmichael, which he declined to do. Carmichael, as shown by his recent correspondence with the witness, was now a permanent resident of Chicago, Illinois. The written testimony of the said Carmichael was delivered to H. L. Bentley, the then district attorney, and had not since been seen by witness. *H. L. Bent-*

ley testified, in substance, that the written testimony of Carmichael, referred to by the witness, Hardwicke, was delivered to him by the said Hardwicke, and remained in his possession until his residence, where he then kept all papers pertaining to his office, and nearly all of its contents, were destroyed by fire, since which time, though he had made diligent search for it, he had been unable to find the said written testimony of the witness, Carmichael. *Johnson v. S.*, 26 App. 631.

## TITLE 9.—OF PROCEEDINGS AFTER VERDICT.

### CH. 1.—OF NEW TRIALS.

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| <p>§2536, Art. 775 to §2539, Art. 777. See C. C. P.<br/>         §2540. Error committed by the court. <i>Annotated.</i><br/>         §2541 and §2542. See C. C. P.<br/>         §2543. Absent testimony. <i>Annotated.</i><br/>         §2544. See C. C. P.<br/>         §2545. When jury has received other testimony, etc. <i>Annotated.</i><br/>         §2546. Misconduct of the jury. <i>Annotated.</i><br/>         §2547. See C. C. P.</p> | <p>§2548. Other causes for new trial. <i>Annotated.</i><br/>         §2549, Art. 778 to §2561, Art. 784. See C. C. P.<br/>         §2562. Statement of facts; preparation and authentication of. <i>Annotated.</i><br/>         §2563. See C. C. P.<br/>         §2564. Statement of facts; time of filing. <i>Annotated.</i><br/>         §2565 to §2567. See C. C. P.</p> |
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#### §2540—1.—Error committed by the court.

An application for continuance is properly refused if it fails to disclose legal diligence to secure the absent witnesses for whom it was asked. But, on the motion for new trial, in reviewing the matter set forth in the application, the trial court should construe the absent testimony in the light of the proof adduced at the trial, and if so construed, the absent testimony appears material to the defense, and probably true, the new trial should be awarded, notwithstanding the failure of diligence to procure the testimony at the trial. *Simmons v. S.*, 26 App. 574.

Under the statutory practice of rules in this state an accused, whose application for continuance has been refused, and who has been convicted, is entitled to a new trial as a matter of right when, in the light of the evidence adduced upon the trial, the absent testimony set out in the application for continuance is material to the defense, and is probably true. Unless such absent testimony, if probably true, would, if procured, tend to disprove the guilt of the accused, it would be too immaterial to authorize a new trial, because of the refusal of the continuance.

This court will not revise the action of the trial court in refusing a new trial because of its previous refusal of a continuance, unless it be made to appear not merely that the accused might probably have been prejudiced by such ruling, but that it is reasonably probable that, had the absent testimony been before the jury, a verdict more favorable to the defendant would have resulted. See the opinion for the substance of absent testimony set forth in the application for continuance and *held* as to one witness to be immaterial, and as to the other not probably true; wherefore the trial court did not err in refusing a new trial. *Browning v. S.*, 26 App. 432.

The defendant's application for a continuance based upon the absence of one Hensley, an alleged material witness, was refused by the trial court before the organization of the jury. The cause proceeding to trial, the trial court permitted two State's witnesses to testify that they had made diligent inquiry in the county of the forum for the alleged absent witness, but that they could find no person who had ever known, seen or heard of such person as Hensley. *Held*, that such evidence was irregular, but, in the absence of a showing that the jurors who

**T. 9, CH. 1.] OF PROCEEDINGS AFTER VERDICT. §§2543-2548.**

tried the case were apprised of the application for continuance, or that such evidence was in any wise calculated to prejudice the accused, its admission was not reversible error. *Testard v. S.*, 26 App. 260.

**§2543—6.—Absent testimony.**

Refusal of a continuance asked on account of absent witnesses was relied upon as cause for new trial, and the refusal of a new trial is assigned for error; but it is apparent of record that due diligence was not used to obtain the testimony of the absent witnesses, and it is not apparent that their testimony would probably be true, if adduced as alleged. *Held*, no cause for reversal. *Brookin v. S.*, 26 App. 121.

A rule of practice which obtains in this state is that if an application for a continuance be refused, and the evidence adduced on the trial discloses that the evidence set out in the application for continuance was material and probably true, a new trial should be granted. See the opinion for a showing of diligence *held* insufficient to have authorized the award of a continuance, but see the same and the statement of the case for evidence disclosed in the application for continuance, which, in the light of the evidence on the trial, entitled the accused to a new trial. *McCline v. S.*, 25 App. 247.

**§2545—7.—Where jury has received other testimony, etc.**

It is shown by the affidavit of a jurymen who tried the case that after the jury had retired to consider of their finding one of the jurors (the foreman) stated to the jury that he knew one of the defendant's witnesses who testified in the case, and that the said defendant's witness' character was bad and that he was unworthy of belief, and affiant stated that his verdict was materially affected thereby. This witness, who was thus being impeached by the foreman of the jury, was one of, if not the most important witness for defendant. One of the grounds expressly enumerated in the statute as being sufficient to entitle a defendant to a new trial is "where the jury, after having returned to deliberate upon a case, have received other testimony," etc. With regard to the impeachment of a witness the same rule obtains as in all cases; the defendant should be confronted with the impeaching witnesses and be afforded an opportunity to cross-examine them. When the right is not accorded him the law presumes that he is injured, and will not permit a verdict to stand where such testimony has been used against him in the jury room, and where the circumstances have not been explained, nor attempted to be explained, by counter-affidavits supporting the integrity of the verdict; which was the case in this instance.

The same irregularity as presented in this record was held reversible error in the case of *Wharton v. S.*, 46 T. 2, and in *Anschicks v. S.*, 6 Texas Court of Appeals, 524. The court should have sustained the motion for a new trial upon the ground of the motion, and because of error in overruling said motion, the judgment is reversed and the cause remanded. *McKissick v. S.*, 26 App. 673.

**§2546—8. Misconduct of the jury.**

The drinking of intoxicating liquor by a juror while deliberating upon the verdict, unless by such drinking he becomes so intoxicated as to render it probable that his verdict was influenced thereby, is not ground for new trial. *Rider v. S.*, 26 App. 334.

Misconduct of the jury will not necessitate the award of a new trial, unless it be made to appear that it resulted in injury to the rights of the accused. *Testard v. S.*, 26 App. 260.

**§2548. Other causes for new trial.**

The defendant in a prosecution for assault with intent to murder applied for a continuance to secure the testimony of one J. The continuance being refused and the case proceeding to trial, the prosecuting witness testified that the wounds upon his person were inflicted by the defendant, and denied that he had ever stated that the said wounds were inflicted by J., the person named in the defendant's application for a continuance. The witnesses for the defense testified that, soon after the wounds were inflicted, the prosecuting witness told them that they were inflicted by said J. Other testimony established the presence and participation of J. in the difficulty. *Held*, that in the light of the proof a new trial should have been awarded. *Brooks v. S.* 26 App. 87.

A continuance is properly refused if the application therefor shows a want of diligence to secure the absent testimony. But see the opinion on rehearing to the effect that, notwithstanding inadequate diligence to secure the testimony

in the first instance a new trial should be granted when, as in this case, the absent testimony, in the light of the evidence on the trial, becomes material to the defense and is probably true. *Cordway v. S.*, 25 App. 405.

The refusal of a continuance will not require the award of a new trial when, in the light of the proof on the trial, the absent testimony set forth in the application for continuance does not appear probably true. *Testard v. S.*, 26 App. 260.

**§2562. Statement of facts; preparation and authentication of.**

The approval of the trial judge is essential to the proper authentication of a statement of facts, and unless the approval of said judge, attested by his signature, is made to appear in the transcript on appeal, a paper purporting to be a statement of the facts proved on the trial, although it be signed by all counsel as an agreed statement, will not be considered by this court. *Ex parte Oscar Dick*, 25 App. 73.

**§2564. Statement of facts; time of filing.**

Statement of facts approved by the trial judge and filed after the adjournment of the court, or after the expiration of the subsequent ten days allowed by the court, will not be considered on appeal, unless the appellant, under the provisions of the act of March 8th, 1887, shows to the satisfaction of this court that he used due diligence to procure the approval and the filing of the same within the time prescribed by law, and that his failure to do so was not due to the fault or laches of himself or his attorney, but was the result of causes beyond his control. See the opinion *in extenso* for a showing under this act held insufficient. *Spencer v. S.*, 25 App. 585.

A statement of facts, to be sufficient, must be approved by the trial judge and filed in the trial court, either in term time, or under an order of court, duly entered, within ten days after the adjournment of the court. This rule, however, has been so far qualified as that when the statement of facts is filed after the times specified, and the appellant shows to the satisfaction of this court that he has used due diligence to secure the approval of the trial judge and the filing of the same within the period prescribed, and that his failure was not the fault of himself or his attorney, but was the result of causes beyond his control, the said statement will be received as a part of the record in the cause, and will be considered on appeal. See the original opinion and the opinion on rehearing for circumstances held not to bring the statement of facts tendered in this case within this rule. *George v. S.*, 25 App. 229.

If a statement of facts be not filed in time, it will not be considered on appeal, unless the appellant, in compliance with the act of March 8th, 1887, shows that he used due diligence to have it authenticated and filed in time, and that the failure to do so was not attributable to him or his attorney, but resulted from causes beyond their control. See the opinion in this case for a showing held insufficient. *Farris v. S.*, 26 App. 105.

Counsel for appellant by his affidavit shows in substance that he was very busy during the ten days next after adjournment, but that on the tenth day he completed his statement and handed it to the district attorney at twelve M., of that day; that the district attorney at three P. M., told counsel that he could not agree. Counsel told the district attorney that he would agree to such corrections as the district attorney would make, and also informed him that he must leave on the train at half-past six P. M.; that the district attorney said he was busy and could not then make the necessary alterations, but would do so later in the day. Counsel left the statement with the district attorney, with the request that the alterations be made and then presented to the judge for approval, and then be filed. Counsel on his way to take the train again saw the district attorney, who informed him that he would not agree to any part of said statement. Counsel then left on the train. Other parts of the affidavit relate to matters occurring after the ten days had passed, and, as they do not affect the question of diligence, need not be stated.

To be entitled to the provisions of the act of March 8th, 1887, it must be shown that due diligence has been used to secure the approval of the trial judge to the statement, and the filing of the same within the period prescribed; and that the failure to do these acts was not the fault of the party or his counsel, but was the result of causes beyond his control. [*George v. S.*, 25 Texas Ct. App. 229; *Spencer v. S.*, 25 Texas Ct. App. 585.]

Such diligence does not appear in this case, and hence we cannot consider the statement of facts found in the record. *Farris v. S.*, 26 App. 105.

T. 9, CHS. 2, 3.] OF PROCEEDINGS AFTER VERDICT. §§2579a, 2583a.

## CH. 2.—ARREST OF JUDGMENT.

§2568, Art. 785 to §2574, Art. 790. See C. C. P.

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## CH. 3.—JUDGMENT AND SENTENCE.

§2575, Art. 791 to §2579. See C. C. P.  
§2579a, Art. 791a. Judgment in case of  
minors not more than sixteen  
years of age. *New*.  
§2580, Art. 792 to §2583, Art. 794. See  
C. C. P.

§2583a. Judgment may be reformed on  
appeal. *Annotated*.  
§2584, Art. 795 to §2598, Art. 806. See  
C. C. P.

### §2579a—Art. 791a.—Judgment in case of minors not more than sixteen years of age.

When upon the trial and conviction of any person in this state of a felony it is found by the verdict of the jury that the defendant is not more than sixteen years of age, and the verdict of conviction is for confinement for five years or less, the judgment and sentence of the court shall be that the defendant be confined in the house of correction and reformatory instead of the penitentiary, for the term of his sentence, and that such defendant be conveyed to the house of correction and reformatory by the proper authority, and there confined for the period of his sentence; and for such service such officer shall be paid the same fees he would be allowed for carrying such convicts to the penitentiary; *providing*, the jury convicting shall say in their verdict whether the convict shall be sent to the reformatory or the penitentiary. [Act April 2, 1889, §12; 21 Leg. p. 95.]

§2583a. Sentence may be reformed on appeal.

The conviction, as shown by the verdict, being for uttering a forged instrument, and the sentence erroneously reciting that it was for forgery, the sentence is reformed by this court to conform to the verdict. *Peterson v. S.*, 25 App. 70.

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## CH. 4.—EXECUTIONS ON JUDGMENTS.

§2599, Art. 807 to §2628, Art. 835. See C. C. P.

## TITLE 10.—APPEAL AND WRIT OF ERROR.

- §2629, Art. 836 to §2649, Art. 853. See C. C. P.  
 §2650. Recognizance of appeal; decisions as to. *Annotated.*  
 §2651, Art. 854. See C. C. P.  
 §2652. Appeal bond; decisions as to. *Annotated.*  
 §2653, Art. 855 to §2675, Art. 870. See C. C. P.  
 §2675a. Appellate court will take notice of facts subsequent to conviction. *Annotated.*  
 §2676 to §2678. See C. C. P.  
 §2679. Judgment reversed and reformed. *Annotated.*  
 §2680, Art. 871 to §2704, Art. 893. See C. C. P.

## §2650. Recognizance on appeal; decisions as to.

Appeal bond or recognizance for appeal must be entered into at the trial term, and cannot be amended after an appeal has been perfected.

No such offense as malicious mischief is known, *per se*, to the law of this state, and an appeal from a conviction for unlawfully breaking and pulling down and injuring the fence of another must be dismissed when the recognizance for appeal describes the offense as malicious mischief. *Koritz v. S.*, 27 App. 53.

## §2652. Appeal bond; decisions as to.

Appeal bond from the justice's to the county court was conditioned that "the defendant shall prosecute her appeal with effect, and shall pay such fine and costs that may be adjudged against her by the county court as well as other cost that may be adjudged against her in the court below." *Held* sufficient, and that the ruling of the county court dismissing the appeal on the ground that the bond was insufficient was erroneous. *Elkins v. S.*, 26 App. 220.

An appeal bond conditioned that the appellant will "pay all fines and costs in the county court, and all costs in the recorder's court," conforms to the statute which provides that the appellant "shall pay such fine and cost as shall be adjudged against him in the county court, as well as other cost that may have been adjudged against him in the court below." *Cavanaugh v. Fort Worth*, 26 App. 85.

The appellant in this case was convicted in the recorder's court of the city of Fort Worth, and was fined five dollars and costs. He executed his appeal bond to the county court in the sum of thirty dollars. Afterwards a bill of costs was taxed against him, which bill and the fine amounted to seventeen and a half dollars, and included the items of twenty-five cents for issuing execution, one dollar and thirty cents for receiving and paying over the fine and costs, and one dollar and a half for the transcript, none of which items had accrued when the appeal bond was executed and approved. The appeal was dismissed by the county court, because the bond was insufficient. The contention is that, deducting the amounts not accrued when the bond was approved, the correct fine and costs were but fourteen dollars and forty-five cents, and that the appeal bond was sufficient in amount. *Held*, that the bond was sufficient, and the appeal was erroneously dismissed. *Drum v. City of Fort Worth*, 25 App. 664.

Conviction in the county court on appeal from a justice's court, and confinement of the accused in the county jail a sufficient length of time to discharge the fine and costs adjudged against him, render the appeal bond to the county court *functus officio*, and it cannot be enforced against the sureties. *Phipps v. S.*, 25 App. 660.

Being convicted in the justice's court for a misdemeanor, the accused appealed to the county court. Subsequently his case was called in the county court, and, upon the State's motion, the appeal was dismissed because the appeal bond was insufficient in amount, and the accused was remanded to jail until the payment by him of the fine and costs. Four days later the State asked the forfeiture of, and judgment *nisi* on, the appeal bond. The motion was granted, and judgment *nisi* was rendered against the principal and sureties on the appeal bond. The accused was thereupon imprisoned, and he made affidavit that he was too poor to pay the fine and costs, in order to obtain the benefit of the allowance on his fine and costs at so much per day, as provided by article 816 of the Code of Criminal Procedure. After the lapse of sixteen days he was discharged. When the *scire facias*

**T. 11, CHS. 1-4.] PROCEEDINGS IN CRIMINAL ACTIONS. §§2675a, 2679.**

was subsequently called, the sureties on the appeal bond answered by setting up the facts stated and alleging that when the appeal to the county court was dismissed the bond became *functus officio*, and that the imprisonment of the accused was a full discharge of the fine and costs. *Held*, that the answer set up a complete defense, and that the ruling of the trial court striking out the same was error. *Childers v. S.*, 25 App. 658.

**§2675a. Appellate court will take notice of facts subsequent to conviction.**

The innocence of the appellants having been clearly demonstrated since their conviction, this court, as an act of justice to them, states that fact. *Speer v. S.*, 26 App. 173.

**§2679. Judgment reversed and reformed.**

The appellate court has jurisdiction to reform both the sentence and the judgment of the trial court so as to conform them to the verdict of the jury and the indictment upon which the trial was had. In this case the indictment charged correctly an attempt to pass as true a false and forged instrument in writing, and the verdict found the defendant guilty as charged in the indictment. The sentence recites and the judgment of the court adjudges the defendant guilty of forgery. The said sentence and judgment are each reformed by this court so as to conform to the indictment and verdict of the jury. *Reyna v. S.*, 26 App. 666.

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**TITLE 11.—OF PROCEEDINGS IN CRIMINAL ACTIONS  
BEFORE JUSTICES OF THE PEACE, MAYORS  
AND RECORDERS.**

**CH. 1.—GENERAL PROVISIONS.**

**§2705, Art. 894 to §2712, Art. 900. See C. O. P.**

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**CH. 2.—OF THE ARREST OF DEFENDANT.**

**§2713, Art. 901 to §2722, Art. 910. See C. C. P.**

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**CH. 3.—OF THE TRIAL AND ITS INCIDENTS.**

**§2723, Art. 911 to §2753, Art. 941. See C. O. P.**

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**CH. 4.—OF THE JUDGMENT AND EXECUTION.**

**§2754, Art. 942 to §2758, Art. 946. See C. O. P.**



## TITLE 12.—MISCELLANEOUS PROCEEDINGS.

### CH. 1.—OF INQUIRIES AS TO THE INSANITY OF THE DEFENDANT AFTER CONVICTION.

§2759, Art. 947 to §2773, Art. 960. See C. C. P.

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### CH. 2.—DISPOSITION OF STOLEN PROPERTY.

§2774, Art. 961 to §2787, Art. 974. See C. C. P.

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### CH. 3.—REPORTS OF OFFICERS CHARGED BY LAW WITH THE COLLECTION OF MONEY.

§2788, Art. 975 to §2793, Art. 980. See C. C. P.

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### CH. 4.—OF REMITTING FINES AND FORFEITURES, REPRIEVES, COMMUTATIONS OF PUNISHMENT AND PARDONS.

§2794, Art. 981. See C. C. P.

§2794a, Art. 981a. Governor may restore  
to citizenship. *New.*

§2795, Art. 982 to §2800, Art. 987. See  
C. C. P.

§2794a—Art. 981a.—Governor may restore to citizen-  
ship.

The governor be, and he is hereby, authorized to restore to full citizenship and the right of suffrage any person who may have been convicted of a felony, when he shall have served out his time in the penitentiary or shall have been pardoned; *provided*, that such person shall possess all other constitutional qualifications as shall entitle him to the right of suffrage. [Act March 6; July 6, 1889; 21 Leg. p. 92.]

T. 13, 14.] INQUESTS—FUGITIVES FROM JUSTICE. §§2836a, 2850.

## TITLE 13.—OF INQUESTS.

### CH. 1.—INQUESTS UPON DEAD BODIES.

§2801, Art. 988 to §2824, Art. 1014. See C. C. P.

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### CH. 2.—FIRE INQUESTS.

§2825, Art. 1015 to §2831, Art. 1021. See C. C. P.

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## TITLE 14.—OF FUGITIVES FROM JUSTICE.

§2832, Art. 1022 to §2836, Art. 1026. See C. C. P.	§2837, Art. 1027 to §2849, Art. 1039. See C. C. P.
§2836a. Extradition warrant. <i>Annotated.</i>	§2850. Decisions as to fugitives from justice. <i>Annotated.</i>

#### §2836a. Extradition warrant.

It is not essential to the sufficiency of an extradition warrant that it shall set out in full or be accompanied by the indictment or affidavit upon which it is based. The rule is that if "the papers upon which the warrant of extradition is issued are withheld by the executive, the warrant itself can be looked to for the evidence that the essential conditions of its issuance have been complied with, and it is sufficient if it recites what the law requires."

Recital in the warrant of extradition that the demand of the governor of the demanding state for the fugitives "was accompanied by a copy of said affidavit duly certified as authentic" is equivalent to a recital in the warrant that the said copy was certified as authentic by the governor of the demanding state.

If the demand for the extradition of the fugitive states facts which show that he is a fugitive from the demanding state to this state, it is sufficient, without stating directly that he fled from the demanding state, and had taken refuge in this state.

A warrant of extradition need not show that the crime charged against the fugitive in the indictment or affidavit is an offense against the laws of the demanding state.

The State was permitted to read in evidence a copy of an affidavit made in California, charging the relator with the offense of obtaining money under false pretenses. *Held* that, the said copy being no part of the respondent's return, nor attached thereto, nor accompanying the warrant, nor authenticated as evidence, nor shown nor claimed to be evidence upon which the warrant was based, its admission in evidence was error, but not such error as will operate to discharge the relator. *Ex parte Stanley*, 25 App. 372.

#### §2850. Decisions as to fugitives from justice.

A person accused of crime committed in this state is amenable in the courts of this state, notwithstanding he was kidnapped in another state or territory, and brought thence against his will and without lawful authority. *Brooklin v. S.*, 26 App. 121.

## TITLE 15.—OF COSTS IN CRIMINAL ACTIONS.

## CH. 1.—TAXATION OF COSTS.

§2851, Art. 1040 to §2859, Art. 1048. See C. C. P.

## CH. 2.—OF COSTS PAID BY THE STATE.

§2860, Art. 1049 to §2864, Art. 1053. See  
C. C. P.  
§2865, Art. 1054. Fees allowed sheriff.  
*Amendment.*  
§2866, Art. 1055 and §2867, Art. 1055a.  
See C. C. P.

§2868, Art. 1056. Fees of clerk of dis-  
trict court. *Amendment.*  
§2869, Art. 1057 to §2875, Art. 1061b.  
See C. C. P.

## §2865—ART. 1054.—Fees allowed sheriff.

To the sheriff or constable shall be allowed the following fees:  
In all cases of felony, where the defendant has been brought to  
trial, whether he be convicted or acquitted, or when the case  
is disposed of by *nolle prosequi* or judgment of dismissal; *provided*,  
*however*, that the fees provided for in this article under subdivision  
8 shall be due and payable when the account shall be allowed and  
approved as therein provided.

1. For executing each warrant of arrest or *capias*, or for making  
arrest without warrant, when authorized by law, the sum of one  
dollar, and five cents for each mile actually and necessarily traveled  
going and returning in executing the same.

2. For summoning or attaching each witness, fifty cents.

3. For summoning jury in each case, where jury is actually  
sworn in the case and defendant tried or case disposed of, two  
dollars.

4. For executing death warrants, fifty dollars.

5. For removing a prisoner, for each mile going and coming, in-  
cluding guards and all other expenses, when traveling by railroad,  
fifteen cents, when traveling otherwise than by railroad, twenty-  
five cents; *provided*, that where more than one prisoner is removed  
at the same time, in addition to the foregoing he shall only be al-  
lowed ten cents a mile for each additional prisoner; *provided, fur-*  
*ther*, that where an officer goes beyond the limits of the state after  
a fugitive on requisition of the governor, he shall receive such  
compensation as the governor shall allow for such service.

6. For each mile the officer may be compelled to travel in exe-  
cuting criminal process, summoning or attaching witnesses, five  
cents; *provided*, that in no case shall he be allowed to duplicate his  
mileage when two or more witnesses are named in the same or dif-  
ferent writs in any case, and he shall serve process on them in the

same vicinity or neighborhood, or during the same trip, he shall not charge mileage for serving each witness to and from the county seat, but shall only charge one mileage and for such additional miles only as are actually and necessarily traveled in summoning or attaching each additional witness. Where process is sent by mail to an officer away from the county seat, or returned by mail by such officer, he shall only be allowed to charge mileage for the miles actually traveled by him in executing such process, and the return of the officer shall show the character of the service and the miles actually traveled in accordance with this subdivision, and his accounts shall show the facts in detail.

7. To officers for service of criminal process not otherwise provided for, the sum of five cents a mile going and returning shall be allowed; *provided*, if two or more persons are mentioned in the same or different writs, the rule prescribed in subdivision six shall apply.

8. For conveying a witness attached by him to any courts out of his county, or when directed by the judge from any other county to the court where the case is pending, two dollars and fifty cents per day for each day actually and necessarily consumed in going to and returning from such court and his actual necessary expenses by the nearest practicable route, or nearest practicable public conveyance, the amount to be stated by him in an account, which shall show the place at which the witness was attached, the distance to nearest railroad station, and miles actually traveled to reach the court; if horses or vehicles were used, from whom hired and price paid and length of time consumed, and amount paid out for feeding horses and to whom; if meals and lodging were provided, from whom and where and what price paid; *provided*, that officers shall not be entitled to receive exceeding fifty cents per meal and thirty-five cents per night for lodging for any witness. Said account shall also show, before said officers shall be entitled to compensation for expenses of attached witnesses, that the witness was called upon by him to give bond, and was offered by him an opportunity to give bond to appear before the proper court, and was unable or refused so to do. And the officer shall also present to the court the affidavit of the witness to same effect, or shall show that the witness refused to make the affidavit, and should it appear to the court that the witness was able and willing to give bond, the sheriff shall not be entitled to any compensation for conveying such witness; and said accounts shall be sworn to by the officer before an officer authorized to administer oaths, and shall state that said account is true, just, and correct in every particular, and present same to the judge, who shall during such term of court carefully examine such account, and if found to be correct, in whole or in part, shall so certify and allow the same for such an

amount as he may find to be correct; and if by him allowed, in whole or in part, he shall so certify; and such account, with the affidavit of the sheriff and certificate of the judge, shall be recorded by the clerk of the district court, in a book to be kept by him for that purpose, which shall constitute a part of the minutes of the proceedings of the court, and the clerk shall certify to the original account and shall show that same has been so recorded, and said account shall then become due, and same shall constitute a voucher on which the comptroller is authorized to issue a warrant, and such minutes of the court, or a certified copy thereof, may be used in evidence against the officer making the affidavit for perjury in case said affidavit shall be willfully false. Where the officer receiving a writ for the attachment of such witnesses shall take a bond for the appearance of any such witness, he shall be entitled to receive from the state one dollar for each bond so taken, but he shall be responsible to the court issuing said writ that said bond is in proper form and has been executed by the witness, with one or more good and solvent securities, and said bond shall in no case be less than one hundred dollars; *provided*, comptroller may require from such officer a certified copy of all such process before auditing any account.

9. All laws in conflict with this article are hereby repealed. [Amendment April 4, 1889; 21 Leg. p 38.]

#### §2868—ART. 1056.—Fees of clerk of district court.

The clerk of the district court shall receive for each felony case tried in such court by jury, whether the defendant be convicted or acquitted, the sum of ten dollars. For each transcript on appeal, or change of venue, ten cents for each one hundred words. For each felony case finally disposed of without trial, or dismissed, or *nolle prosequi* entered, ten dollars. For recording each account of sheriffs, as provided for in article 1054, Code of Criminal Procedure, the sum of fifty cents. [Amendment April 6, 1889; 21 Leg. p. 40.]

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#### §2894a. Physician not entitled to compensation.

Under our statute there is no provision for the compensation of a physician summoned to aid in or conduct a *post-mortem* examination in an inquest. *Fears v. Nacogdoches County*, 71 T. 338.

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## §2929a. Commissions allowed district and county attorneys; decisions as to.

A county attorney's right to commissions on forfeitures (or fines) accrues, and the said commissions are payable to him only when the said forfeitures (or fines) are collected and out of the money so collected. Though the forfeiture or fine was not collected because the same was remitted by the governor, still the county attorney is not entitled to commissions on it.

Smith was fined in the county court in the sum of seven hundred and seven dollars, of which amount all but two hundred dollars was subsequently remitted by the governor and Smith paid the two hundred dollars and costs. The county attorney, claiming commission on the amount of the fine remitted, sued out an execution on the judgment and placed it in the hands of the sheriff, whereupon Smith sued out a writ of injunction to restrain the collection of the amount so claimed by the county attorney as commission. The injunction was granted, but was subsequently dissolved upon the motion of the defendant in error. *Held*, that the State was not a party to the suit; that it was purely a proceeding against the county attorney and the sheriff, and that the court erred in dissolving the injunction. *Smith v. S.*, 28 App. 49.



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